

**FEDERAL MINE SAFETY
AND
HEALTH REVIEW COMMISSION**



OCTOBER 1990
Volume 12
No. 10

DECISIONS

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OCTOBER 1990

Review was granted in the following cases during the month of October:

Utah Power & Light Company v. Secretary of Labor, MSHA, Docket No.
WEST 90-285-R. (Judge Lasher, August 27, 1990)

Secretary of Labor, MSHA v. Westmoreland Coal Company, Docket No.
VA 90-28. (Judge Weisberger, September 18, 1990)

There were no cases filed in which review was denied.

COMMISSION DECISIONS

October 19, 1990

EMERY MINING CORPORATION	:	
and UTAH POWER AND LIGHT CO.,	:	
MINING DIVISION	:	
	:	
v.	:	Docket Nos. WEST 87-130-R, etc.
	:	
SECRETARY OF LABOR,	:	
FEDERAL MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
and	:	
	:	
NATIONAL UNION OF MINE WORKERS OF	:	
AMERICA (UMWA)	:	

ORE: Backley, Acting Chairman; Doyle and Nelson, Commissioners

ORDER

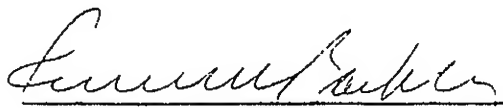
THE COMMISSION:

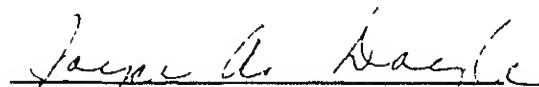
On March 8, 1989, the Commission directed for review cross-petitions for discretionary review filed by the Secretary of Labor and Utah Power and Light Company ("UP&L") in these consolidated contest and civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988). On March 24, 1989, the Commission granted the joint motion of the cross-petitioners to stay this matter pending resolution of related proceedings before Commission Administrative Law Judge John J. Morris involving Emery Mining Corporation ("Emery") because resolution of those related proceedings would render review in this matter unnecessary. The parties were directed to keep the Commission informed of the status of the related cases on a periodic basis, and they have done so since the stay was granted.

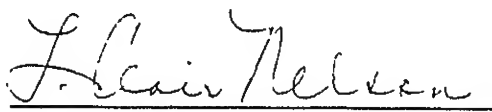
In September 1990, the Secretary and UP&L each filed a separate motion to Voluntarily Dismiss Petition for Discretionary Review. The cross-petitioners state that on September 17, 1990, Judge Morris resolved in the related cases a settlement between the Secretary and Emery that resolved all issues in those proceedings. The Secretary and

UP&L state that as a result of the settlement in the Emery cases, they are no longer interested in pursuing this matter before the Commission. Each cross-petitioner also supports the dismissal of the other's petition. The United Mine Workers of America has not filed a response to the dismissal motions. Upon consideration of the Secretary's and UP&L's motions, we conclude that adequate reasons have been presented for dismissal of this proceeding and we grant both motions. See generally, e.g., Youghioghney & Ohio Coal Co., 7 FMSHRC 200, 203 (February 1985).

Accordingly, the previous stay is dissolved, the Commission's direction for review is vacated, and this proceeding is dismissed. 1/


Richard V. Backley, Acting Chairman


Joyce A. Doyle, Commissioner


L. Clair Nelson, Commissioner

Distribution

Timothy Biddle, Esq.
Thomas Means, Esq.
Crowell & Moring
1001 Pennsylvania Ave.
Washington, D.C. 20004

Dennis D. Clark, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Mary Lu Jordan, Esq.
UMWA
900 15th St., N.W.
Washington, D.C. 20005

1/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three Commissioners to exercise the powers of the Commission in this matter.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

October 30, 1990

SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. SE 89-109-M
	:	
MEDUSA CEMENT COMPANY-DIVISION	:	
MEDUSA CORPORATION	:	

BEFORE: Backley, Acting Chairman; Doyle and Nelson, Commissioners

ORDER

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"), counsels for the Secretary of Labor and Medusa Cement Company ("Medusa") have filed with the Commission a Joint Motion to Approve Settlement. For the following reasons, the parties' settlement approval motion is granted, and this matter is dismissed.

On January 23, 1990, we granted Medusa's petition for discretionary review of a decision of Commission Administrative Law Judge Roy J. Maurer, concluding that Medusa violated 30 C.F.R. § 56.14211(d). 11 FMSHRC 2531, 2533 (December 1989). On October 25, 1990, the Secretary and Medusa filed the Joint Motion to Approve Settlement.

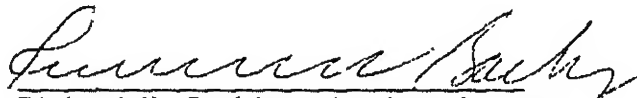
In their motion, the parties explain that Citation No. 2857907, which is the subject of this action, was issued to Medusa because a work platform used by Medusa to hoist personnel was attached to a load line rather than to the crane boom itself. Medusa has raised a question concerning the proper interpretation of section 56.14211(d) and whether its cited conduct violated the standard. The parties note that on September 5, 1990, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a Program Policy Letter superseding its prior policy pertaining to section 56.14211(d). The Policy Letter provides that operators are permitted to hoist personnel with cranes using a load line to support a work platform and comply with section 56.14211(d) if four safety features detailed in the policy letter are

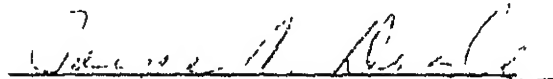
implemented. The citation involved here was not issued because of a failure to implement the four safety features and the parties state that the record does not reflect whether these safety features were present on Medusa's crane at the time of the inspection. In their joint motion, the Secretary and Medusa request approval of their settlement, including vacation of the citation and assessed penalty, vacation of the Commission's direction for review, and dismissal of the proceeding.

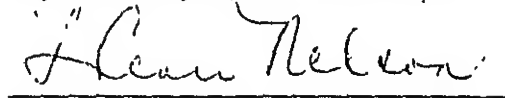
Oversight of proposed settlements of contested cases is an important aspect of the Commission's adjudicative responsibilities under the Mine Act (30 U.S.C. § 820(k)) and is, in general, committed to the Commission's sound discretion. See, e.g., Pontiki Coal Corp., 8 FMSHRC 668, 674-675 (May 1986). The Commission has granted motions to vacate citations and orders and to dismiss review proceedings if "adequate reasons" to do so are present. E.g., Southern Ohio Coal Co., 10 FMSHRC 1669, 1670 (December 1988), and authorities cited ("SOCOCO").

We conclude that adequate reasons exist to grant the parties' motion in this case. As the prosecutor charged with enforcement of the Act, the Secretary has determined that she should seek dismissal of this proceeding. The operator joins in the motion. No reason appears on this record to warrant denial of the motion before us. See, e.g., Morgan Corp., 12 FMSHRC 394, 395 (March 1990).

Therefore, upon full consideration of the motion, it is granted. Medusa's petition for review is dismissed. The underlying citation and the assessed civil penalty are vacated. Our direction for review is also vacated and this proceeding is dismissed.


Richard V. Backley, Acting Chairman


Joyce A. Doyle, Commissioner


L. Clair Nelson, Commissioner

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 SKYLINE, 10th FLOOR

5203 LEESBURG PIKE

FALLS CHURCH, VIRGINIA 22041

OCT 4 1990

ROBERT A. COOK, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. PENN 89-46-DM
COLLIER STONE, : MSHA Case No. MD 88-62
Respondent :

DECISION

Appearances: Mr. Robert A. Cook, McDonald, Pennsylvania,
pro se, for the Complainant;
Timothy P. O'Reilly, Esq., Pittsburgh,
Pennsylvania, for the Respondent.

Before: Judge Fauver

Complainant brought this action under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., alleging he was discharged in violation of that section.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and further findings in the Discussion below.

FINDINGS OF FACT

1. Respondent operates an open pit mine in Pennsylvania where it produces crushed stone and aggregate used in or substantially affecting interstate commerce.

2. Complainant was employed by Respondent from March 2, 1987, to May 6, 1988.

3. The mine was inspected by the Mine Safety and Health Administration (MSHA), United States of Labor, on May 6, 1988. Around noon on that date, the MSHA inspector interviewed Complainant near the machine he was operating. Complainant talked to the inspector about 5 minutes, and told him about certain safety defects on the equipment.

4. Respondent's manager (and part-owner), William F. Duchess, knew that Complainant talked to the MSHA inspector.

5. At the end of Complainant's shift, around 3:00 p.m.¹, on May 6, 1988, Mr. Duchess handed Complainant two paychecks, instead of his normal paycheck, and told him he was fired. The parties are in sharp dispute as to Mr. Duchess' statement to Complainant as to the reason for his discharge.

DISCUSSION WITH FURTHER FINDINGS

Complainant shortly found another job and is satisfied where he is presently employed. He does not seek backpay or reinstatement in this action. He seeks a finding that Respondent fired him because he reported safety defects to the MSHA inspector on May 6, 1988.

He testified that Mr. Duchess stated, when he fired him, that the company did not want any "stool pigeons" in its employment. Mr. Duchess denies this, and testified that he stated to Complainant that he was fired because he was not performing his job satisfactorily despite a prior warning. He also testified as to a prior warning he gave to Complainant about his job performance.

Mr. Duchess' testimony is consistent with the testimony of the payroll clerk, who stated that on May 4, 1988, Mr. Duchess had told her to prepare two checks for Complainant and two checks for another employee, named Adler, because they were both being fired for unsatisfactory job performance.

Generally, in order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of proving that (1) he or she engaged in protected activity and (2) the adverse action complained of was motivated in any part by that activity. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that it was also motivated by the miner's unprotected

¹One check was a normal paycheck; the second check was a termination check.

activities and would have taken the adverse action on those grounds alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, supra. The ultimate burden of persuasion does not shift from the complainant. United Castle Coal Company, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983).

The reliable evidence does not preponderate to sustain, by greater weight, Complainant's account of the facts. Inasmuch as Complainant has the burden of proof, I find that he has not proven a discriminatory discharge within the meaning of section 105(c) of the Act.

CONCLUSION OF LAW

1. The judge has jurisdiction over this proceeding.
2. Complainant has not met his burden of proving a violation of section 105(c) of the Act.

ORDER

WHEREFORE IT IS ORDERED that this proceeding is DISMISSED.


William Fauver
Administrative Law Judge

Distribution:

Mr. Robert A. Cook, RD #4, Box 154A, McDonald, PA 15057
(Certified Mail)

Timothy P. O'Reilly, Esq., 1805 Law & Finance Building,
Pittsburgh, PA 15119 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 4 1990

KATHLEEN I. TARMANN, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. LAKE 89-56-DM
: :
INTERNATIONAL SALT COMPANY, : MD 89-10
Respondent :
: Cleveland Mine

DECISION

Appearances: Daniel Kalk, Esq., Valore, Moss & Kalk, Cleveland,
Ohio for Complainant;
Keith A. Ashmus, Esq., Thompson, Hine and Flory,
Cleveland, Ohio for Respondent.

Before: Judge Melick

This case is before me upon the complaint by Kathleen I. Tarmann under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging discriminatory suspension by the International Salt Company (International Salt) in violation of section 105(c)(1) of the Act.^{1/}

^{1/}Section 105(c)(1) of the Act provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment, has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such representative of miners or

More particularly Ms. Tarmann alleges in her complaint as follows:

On October 19, 1988, I was discharged for allegedly being insubordinate to a reasonable order from my foreman Robert Hatfield.^{2/} The order was not only unreasonable, but discriminatory as well.

Mr. Hatfield ordered me to abstain from a normal biological function. Mr. Hatfield refused to allowed me to go to the surface to use the ladies room, as the one in the mine was dirty. Mr. Hatfield told me that he would allow me a half hour to clean the bathroom. When I told Mr. Hatfield I couldn't wait that long he still refused to allow me to go. Mr. Hatfield and other foreman [sic] had allowed the men to go to the surface to use the bathroom when the ones in the mine are dirty. Mr. Hatfield had made several statements to get me prior to this incident and make me pay for causing him trouble with his boss. Mr. Hatfield made these statement on the skip and many people heard him. I belive [sic] Mr. Hatfield deliberately did not clean the womens [sic] bathroom to get back at me and forced me into the situation.

In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of proving that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by the protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981).

The mine operator may rebut a prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If the

cont'd fn.1

applicant for employment has instituted or caused to be instituted any proceedings under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act."

^{2/} The Complainant was subsequently reinstated with suspension following arbitration.

operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity. Pasula supra., Robinette supra.; see also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (C.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-6 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving a nearly identical test under the National Labor Relations Act).

As clarified at hearings in this case the Complainant is maintaining that her suspension by International Salt on October 19, 1988, was a discriminatory response to the following protected health and safety complaints: (1) on or about October 8, 1988, to her foreman Robert Hatfield and to Hatfield's supervisor, Mine Superintendent Bruce Higgins, that Hatfield was sleeping at his desk in the shop office during their workshift and that he had also taken the phones off the hook in his office, and (2) during the midnight shift on October 18-19, 1988, she complained to Hatfield that the ladies toilet in the shop area was not in a sanitary and safe condition. The fact that complaints of this general nature were made is not disputed. The first element of a prima facie case has therefore been established.

The second element of a prima facie case is a showing that the adverse action was motivated in any part by the protected activity. Direct evidence of motivation is rarely encountered. More typically, the only available evidence is indirect. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (1981). In the instant case it is clear that management had knowledge of the cited protected activities. The Complainant further maintains that foreman Hatfield displayed hostility toward her complaints about his sleeping on the job by statements purportedly made on a crowded "skip" or elevator as the midnight shift crew was being transported to work one evening. Complainant described the alleged threats in the following colloquy at trial:

Q. [By Counsel for Complainant] Now, how do you know that the actions taken against you were as a result of

your health and safety complaint to Higgins and your health and safety complaints to Hatfield?

A. [Complainant Tarmann] Because Bob told me on the skip.

Q. Bob who?

A. Bob Hatfield.

Q. Okay.

A. On the skip told me that the person responsible for him having to take an extra vacation, an unscheduled vacation, was going to pay. He said that.

THE COURT: When was this stated?

THE WITNESS: Pardon Me.

THE COURT: When was this statement made?

THE WITNESS: It was on the skip coming up out of the mine the next day.

THE COURT: After the incident discussing the toilet conditions?

THE WITNESS: No, the next day after I talked to his boss about him sleeping.

Q. And that would have been approximately what date?

A. Probably the 12th or 13th.

THE COURT: Of October 1988?

A. Right.

Q. Okay, and what did he tell you?

A. He said that I was going to pay.

Q. For what?

A. For going over his head, for causing him trouble with his boss and causing him to have to take an extra vacation and --

Q. Did you explain to him that you were simply doing your job as health and safety representative?

A. At that time?

Q. Yes.

A. On the skip or talking to him?

Q. Talking to Hatfield.

A. Yeah.

Q. And what did he say about that?

A. He didn't say much of anything. He didn't say anything.

Q. Now, from the date that you caught him sleeping, which was approximately the 10th of October, to the date that you were suspended, approximately the 19th of October, how many discussions did you have with Hatfield when he either warned you or told you about his plans as they related to you because of your activity?

A. I'd say it went on for three days on the skip, two or three days.

Q. Were there other people on the skip at the time that you heard this?

A. Oh. yeah.

Q. And who were they?

A. John Budziak, Richard Fisher, Brad Diven, Bob Damron, and there were other people too.

Q. And they heard everything you heard?

A. I guess they did, yeah. They did, yeah.

Q. And tell the judge the rest of what they said to you regarding your health and safety complaints and the action he was going to take against you?

A. Well, he said that I was definitely going to pay. he looked straight at me, and I mean there was no love in his eyes either, and he told me I guarantee you, she will pay.

Several of the Complainant's witnesses claim to have heard different variations of the these alleged statements. In any event Hatfield explained in the following colloquy at trial the most credible explanation for what occurred on the elevator:

Q. [By Counsel for Respondent] Do you recollect making some kind of comment on a skip about vacation?

A. [Hatfield] Yes I do.

Q. Can you describe to the judge exactly what you recall about that?

A. Well, what it was, on the vacation, I had a vacation scheduled for later that year. And Bob Foster, he was a relief foreman underground at the time, and he was getting ready to go upstairs. And so Baker, Mr. Baker asked me if I could take a vacation a couple weeks early.

THE COURT: Who's Baker now?

THE WITNESS: He's a superintendent of maintenance underground.

THE COURT: All right. He's your boss?

A. Right. He asked me if I could take my vacation early so Bob could fill in for me, and I said sure, I could. So we scheduled it up early. And I've got a foreman that always sort of riled up a little bit, and I told him to give me an extra vacation because he knew when my vacation was.

Q. Who was that foreman?

A. Jim Bannerman.

* * * *

A. And so he must have got the word around that I was getting an extra vacation, because I told him I was working so hard that he was going to give me an extra vacation, and so Gene Sharpe on the skip, he said --

THE COURT: Who's Gene Sharpe now?

THE WITNESS: One of the employees that used to work for me in '88.

Q. Hourly employee?

A. Hourly employee, yes, he said, Bob said, "I hear tell you're getting an extra vacation". I said "yeah". I said "people's complained that I've been working too hard and they're giving me an extra week's vacation. I sure appreciate that. I'd like to thank whoever got this started", just more or less joking around. And that was about all that was said.

Q. And did you actually ever take an extra vacation or this changed vacation?

A. No, I didn't. Bob Foster got sick and so I couldn't take my vacation when we re-arranged it, so I ended up taking it the same week that I had it -- already had it scheduled.

Q. Now, in that skip when you said that, you were talking to Gene Sharpe at the time?

A. Yes.

(Tr. 287-289)

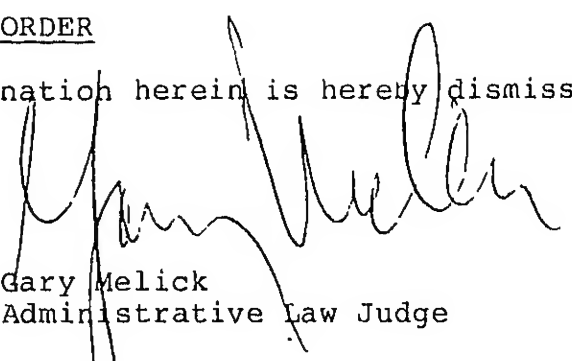
Hatfield accordingly maintains that the statement attributed to him on the skip was certainly not retaliatory. Inasmuch as the persuasive credible evidence clearly shows that Hatfield was never in fact required to change his vacation and was not in fact subject to discipline, and that management knew he was then being treated for narcolepsy, I conclude that Hatfield did not demonstrate any retaliatory motivation towards Ms. Tarmann in this regard.^{3/}

Tarmann also cites her subsequent complaints to Hatfield on the October 18-19, midnight shift about the conditions of the ladies shop area toilet as a basis for her suspension. Hatfield made notes of events shortly after they occurred that evening. (See Appendix I) I give these contemporaneous notes, which were corroborated in essential respects at hearing, significant weight and indeed I find this version of events to be the most credible. I find then that Ms. Tarmann's suspension was the result of her refusal to clean the toilet as she had been directed to do earlier on the shift before her alleged "emergency" need to use the toilet and for her use of an apparent duplicitous subterfuge to use the outside toilet facilities in violation of the direct order of her foreman. These activities are clearly not protected activities and reliance on these (in addition to her previous disciplinary record) by management in suspending the Complainant was not in contravention of Section 105(c) of the Act. There is moreover insufficient credible evidence to show that management was motivated in any part by her protected activities. Under the circumstances I find that there was no violation of Section 105(c) and that this case must be dismissed.

^{3/} I note that the Arbitrator below also rejected the testimony of Ms. Tarmann and her witnesses on this issue.

ORDER

The complaint of discrimination herein is hereby dismissed.



Gary Melick
Administrative Law Judge

Distribution:

Daniel Kalk, Esq., Valore, Moss & Kalk, 75 Public Square,
Suite 300, Cleveland, OH 44113 (Certified Mail)

Keith A. Ashmus, Esq., Thompson, Hine and Flory, 1100 National
City Bank Building, 629 Euclid Avenue, Cleveland, OH 44114-0370
(Certified Mail)

nb

APPENDIX I

On October 19, 1988, I, Bob Hatfield, was approached by Kathy Tarmann at 12:05 AM and she was upset about her bathroom. She said her bathroom looked like a pig's eye [sic] or something like that and she couldn't use it. Mike Miller and both utility men, Jose Sanchez and Mark Miller were present and this incident happened in front of the electrician's pad. I asked her if they didn't change her bathroom today and yes but they didn't clean it good enough for her to use. I told her she would have to make do, clean it enough to use and I'd talk with Mike in the morning. Then she said this place never learns and she was going to take this damn company to court and sue them. She kept talking like this until she was out of ear shot.

The next time I went by her bathroom, I was going to check it but it was locked and I didn't have the key on me so I just glanced at the other two and they seemed very clean to me. Then about 1:50 AM I was going toward the substation and Kathy came raging out of the substation cursing, not really at me, but at the company in general, saying things like she was taking this G.D. company to court and she has complained about the bathrooms for years now and no damn body tries to help her. Then when she got to where I was she told me that she wasn't about to use the bathroom and she was going to go upstairs where they had a decent damn bathroom. This conversation took place in front of 3 air door and present were Kathy, myself, Mike Miller and Mark Miller. Jose Sanchez, Ken Mate and Jim Swann had stopped as they were going to the shop. I told Kathy in a calm but to the point voice that she could not go upstairs because if I let her go I'd have to let everyone go and I'd never get anything done with my men yo-yoing up and down the skip. I also explained to her that if she needed time to clean her bathroom to go ahead and clean it so she could use it, but no way was she going upstairs. At this she really started raging and told me that she would have my M.F. ass into court along with the G.D. company and sue us, that we'll never learn until she sues our damn asses. She said other things until I told her if she didn't calm down

and quit cursing and raving, I'd have to ask her to leave the mine until we could meet with higher people than me. She quit cursing and was just raging under her breath and started walking toward the storeroom. I told Mike Miller to jump on my cushman and I started to take him down into the mill. That's when I decided to go to the office to get Kathy some rags to clean the bathroom. When I was getting her rags she was yelling at me saying it was a shame that a big company couldn't provide her with a clean bathroom and that she needed to clean her bathroom and that she wasn't supposed to have to clean her bathroom and she needed rubber gloves, etc. etc. I told her the gloves were next door in the storeroom. I was getting back on my cushman when she came out of the storeroom and she was ragging [sic] again, cursing and saying she was going to teach this G.D. company a lesson, she was going to sue this G.D. place and all she wanted was a clean bathroom and it wasn't her job to clean it. Swann, Mate, Mark and Jose were in front of the storeroom at this point and she came to my cushman, jumped on it and threw the rags and gloves on the seat, pushed them back behind us and said I'm going home, take me out. I don't have 30 minutes to clean my damn bathroom so I'm going home. I told her fine and I took her to the serving skip.

Kathy had mentioned calling Bruce Higgins when she was in my office to get her rags and I told her she wasn't going to wake up anybody over such a petty thing as this, but when I went down to the mill with Mike Miller, Jose Sanchez and Mark Miller, Mark said she was probably up there calling Bruce and I 'd be in big trouble tomorrow. I didn't comment and then Mark said Kathy gets mad and goes home and we have to do her work. I told Mark, no, he's to do the work I assigned him. this was about 2:10 AM. After Mark and Jose and Mike got the cable through the conduit, I went down to where Gene Sharp was working to check on his job when Joe the mill man yelled at me saying the phone was for me. It was Kathy and I thought that she was calling telling me she was up and ready to go home so I asked Joe to find out what she wanted and she told Joe she wanted to talk with me. I went back to the phone and she said, "I'm back from using the bathroom and I'm in the shop." I said that she said she was going home and I told her to stay there that I'd be up at the shop. I went to the shop and Kathy was in front of my office by herself so I drove up and she got on my cushman and just sat there. I went in my office to make sure that my desk was locked then I told you you couldn't go upstairs to use bathroom and you said you were going home so you'd

better go! She asked "Where do you want me to work?" This was about 2:18 AM. I started taking her down the shop toward the lunchroom telling her that I wasn't going to assign her any work and she said wait a minute, do I get paid for the rest of the night? Do I need my Steward and a meeting? At this I turned around and immediately started back to the office where I started to call Bill Baker or Bruce Higging. Then I stopped and told Kathy that I wasn't going to call in anyone but I'd work her under protest until in the morning when Bill comes in and we can have a meeting. I also read her Plant Rule #5 -- Failure or refusal to obey reasonable instructions of a supervisor. She broke this rule when she didn't clean the bathroom and when she went upstairs (as if she was going home) just to use the bathroom when I told her she couldn't. She also came back underground without asking permission. I read her Plant Rule # 34 -- As a condition of employment hourly employees shall not leave the plant (which means underground if you are assigned there), nor visit the parking lot without supervisor's permission. She did not have my permission to leave the mine to use the bathroom; she left on her own supposedly to go home.

Kathy said, "I need my Steward." I told her I'd call one in and she should go and help Mike. She asked where he was and I told her in the mill at 21 MCC.

During lunch I called Len Davis and told him to get hold of John Shumney and let him call me. John called about 3:05 AM and I explained what happened and that I was working Kathy under protest until Bill comes in for a meeting. Shumney said he'd be better talk to Kathy and said he'd call about 4:30 AM to see when Bill was coming in. Bill was going to come in early anyway, which I mentioned to John.

I made the rounds in my work area to make sure everyone was busy and I started thinking that at this plant, no one was ever worked under protest so I'd better get my boss in. At about 4:00 or 4:15 AM I called Bill Baker after I wrote down everything that had happened. When I went out I bumped into Kathy and Karl on Dave Green's cushman. I asked Dave why Kathy was on his cushman and he said she took it. At the first part of the shift she tried to take my mechanic's cushman and I told my mechanic to go get it back. the electrician's cushman was down. Anyway, Kathy and Karl asked me if they could have a meeting and I told them it would have to be later. I checked on a couple of

jobs while waiting for Bill to show up. I got hold of Bruce who said they would be down since Bill should be in anytime. I bumped into Kathy and Karl again and said they would be down since Bill should be in anytime. I checked on a couple of jobs while waiting for Bill to show up. I got hold of Bruce who said they would be down since Bill should be in anytime. I bumped into Kathy and Karl again and said I was waiting for Bill so they drove off. they had been in front of the bathrooms earlier so I assumed Karl was investigating. I got a call from John Good wanting to know if I was through with Karl and I told John that I didn't send for Karl but I was going to have a meeting with him, Kathy and Baker when Bill came in. Not long after, Bill and Bruce came in and we had the meeting, and Kathy was suspended after this meeting.

Nothing else happened until I went up with my people to the United Way meeting. After I got back from that meeting and went out to get the hourly timecards, someone from the waiting room yelled and said, "Kathy says you're not going to make it home!" When I got back underground and was doing my paperwork, someone went by the office and said, "you've had it when you go home!" Then Frank Smutko came into the office and asked if I had a magic marker and when I gave it to him he marked an X over my heart and said that was where I was going to get it on the way home or in the near future and laughed. Nothing happened on the way home or at home on the 19th.

Under protest due to the early hours and not wanting to wake someone up, I worked Kathy until my boss showed up for the meeting. My recommendation is to suspend Kathy until further investigation into this matter.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

October 10, 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 90-40
Petitioner	:	A. C. No. 36-04852-03698
	:	
v.	:	Urling No. 1 Mine
KEYSTONE COAL MINING	:	
CORPORATION,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT ORDER TO PAY

Before: Judge Merlin

The Solicitor has filed a motion to approve settlement of the three violations involved in this case. The originally assessed penalty was \$3,700 and the proposed settlement is \$2,250. The Solicitor discusses the violations in light of the six statutory criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977.

Order No. 3300139 was issued as a 104(d)(2) order for a violation of 30 C.F.R. § 75.400 because coal was being dumped along with gobbed rock in the No. 2 entry. The originally assessed penalty was \$1,200 and the proposed settlement is \$750. Order No. 3088570 was issued as a 104(d)(2) order for a violation of 30 C.F.R. § 75.400 because combustible materials were permitted to accumulate in the 10 east working section. The originally assessed penalty was \$1,300 and the proposed settlement is \$750. Order No. 3088575 was issued as a 104(d)(2) order for a violation of 30 C.F.R. § 75.400 because loose coal and coal dust, combined with gobbed materials, were permitted to accumulate or be stored in the crosscuts left and right off the No. 2 entry of the 5 east section. The originally assessed penalty was \$1,200 and the proposed settlement is \$750.

The Solicitor represents that the reductions are warranted because negligence and gravity were less than originally thought. According to the Solicitor, the operator has encountered mining conditions which have caused difficulty in the removal of gobbed materials, such as rock and slate, from the coal being produced. The operator sought assistance from MSHA in determining an appropriate method to handle the gobbed materials which could contain some coal, and MSHA provided information concerning control of this material. The operator believed that MSHA had accepted the rock dusting method it used to render gob materials inert. However, the Solicitor advises that the subject violations involved coal accumulations combined with the gobbed

materials and that MSHA has consistently distinguished coal accumulations from gobbled materials and that accumulations must be removed from the mine. The parties agree that the subject orders do indeed properly cite violations of the named standard. In addition, the finding of unwarrantable failure remains unchanged so that the recommended settlement amounts remain substantial.

In addition, the Solicitor avers that although negligence remains high it was somewhat mitigated because the operator misunderstood what was required. I have difficulty in understanding the Solicitor's negligence argument. However, since the parties are in agreement, I will let the unwarrantable finding stand. I do accept the Solicitor's statement that although gravity is high, the degree of gravity was mitigated because the gobbled materials were rock dusted. Finally, I note the Solicitor's representations that the reductions are justified because the operator demonstrated a high degree of good faith in resolving these violations. Thus, the operator immediately removed the accumulations and is in the process of renovating its cleaning plant so that the excessive rock and slate problems which led to the issuance of orders will not recur. Both actions have required great expense.

Based upon the foregoing, I find that the proposed settlements are appropriate and approve them.

Accordingly, it is ORDERED that the proposed settlements be APPROVED and the operator PAY \$2,250 within 30 days of the date of this decision.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and a long, sweeping underline.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Catherine Oliver Murphy, Esq., Office of the Solicitor, U. S. Department of Labor, Room 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

William M. Darr, Esq., Keystone Coal Mining Corporation, 655 Church Street, Indiana, PA 15701 (Certified Mail)

Robert H. Stropp, Jr., Esq., General Counsel, UMW, 900 15th Street, N.W., Washington, DC 20005 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

October 10, 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 90-42
Petitioner	:	A. C. No. 36-00823-03725
	:	
v.	:	Jane Mine
	:	
KEYSTONE COAL MINING	:	
CORPORATION,	:	
	:	
Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

The Solicitor has filed a motion to approve a settlement for the one violation involved in this case. The originally assessed penalty was \$1,200 and the proposed settlement is \$800. The Solicitor discusses the violation in light of the six statutory criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977.

Citation No. 3300116 was issued as a 104(d)(1) citation for a violation of 30 C.F.R. § 75.400 because float coal dust was permitted to accumulate on rock dusted surfaces in the immediate return. The Solicitor represents that the reduction is warranted because negligence is not as high as originally thought. Based upon the Solicitor's representations, I believe that gravity also is somewhat less than had been thought. The Solicitor states that the operator properly conducted onshift examinations of the areas and believed that it was not necessary to rockdust the area again. Further, the operator believed that the area was slightly gray in color and noted that several parts of the area were damp or wet. So too, the inspector conceded that parts of the area were wet. According to the Solicitor, it is uncertain how long the condition existed. Finally, no accumulations were noted in the preshift books nor were any citations issued for failure to record the condition.

The Solicitor states that because of the foregoing circumstances, the citation has been modified to a 104(a) citation. This action is clearly correct since the operator's conduct did not rise to the level of unwarrantable failure as that term has been defined by the Commission. In my opinion, the dampness

which contributed to a lessening of the negligence factor also mitigates gravity. Nevertheless, I agree with the Solicitor that the violation was serious because there remained a risk of explosion or fire.

Based upon the foregoing, I find that the recommended settlement is appropriate.

Accordingly, it is ORDERED that the proposed settlement be APPROVED and the operator PAY \$800 within 30 days of the date of this decision.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with the first name "Paul" and last name "Merlin" clearly distinguishable.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Catherine Oliver Murphy, Esq., Office of the Solicitor, U. S. Department of Labor, Room 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

William M. Darr, Esq., Keystone Coal Mining Corporation, 655 Church Street, Indiana, PA 15701 (Certified Mail)

Robert Stropp, Esq., General Counsel, UMWA, 900 15th Street, N.W., Washington, DC 20005 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 11 1990

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 90-26-M
Petitioner : A.C. No. 54-00240-05511
v. :
Cantera Caná
PUERTO RICAN CEMENT COMPANY, :
Respondent :

DECISION

Appearances: James A. Magenheimer, Esq., Office of the
Solicitor, U.S. Department of Labor, New York,
for Petitioner;
Daniel R. Dominguez, Esq., Dominguez & Totti,
Hato Rey, Puerto Rico, for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging Puerto Rican Cement Company, Inc., (Puerto Rican Cement) with one violation of the regulatory standard at 30 C.F.R. § 56.14200 and proposing a civil penalty of \$1,500 for the alleged violation. The general issue before me is whether Puerto Rican Cement violated the cited regulatory standard and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Citation No. 3250616 issued August 10, 1989, pursuant to section 104(a) of the Act alleges a "significant and substantial" violation of the noted mandatory standard and charges as follows:

A fatal accident occurred at this operation on 08-08-89 when the Euclid No. 245 hauling truck rolled over a person who was in [sic] foot. The truck did not sound the horn before start [sic] moving the truck.

It is undisputed that Francis González a truck driver was fatally injured at 8, 1989, when he was run over by a cement Cantera Caná Mine in Ponce, Miguel Torres, a truck driver for

Puerto Rican Cement, testified at hearing that he was in the control room completing a report when he saw González crossing as the haul truck began moving out from the crusher. He saw the victim walk over to a faucet then turn back as the truck began moving from the crusher. The truck had moved about 40 feet when it struck González. Torres acknowledged that he told the MSHA investigator that he did not hear the truck driver blow his horn as he exited from the crusher and that he was standing within 5 to 6 feet of the truck while he was in the control room.

Torres estimated that the truck was travelling at about 5 to 7 miles an hour and was not in an area where it could pick up speed. He also testified that the type of truck that struck the victim has a blind spot directly in front and to the right side so that you cannot see people up to about 43 feet. This was because of the 7 to 8-foot-high truck structure. Torres also testified that he signed a paper following a February 23, 1989, safety meeting indicating that he was aware of a requirement to blow the horn before moving the truck. Torres admitted however that he in fact did not make it a practice to blow his truck horn or use any other signal before pulling away from the crushers if there were no persons present. He acknowledged that he had never been disciplined for failing to blow his horn before pulling out.

Alejandro Batista, a supervisory MSHA Inspector conducted an investigation at the accident scene on August 10, 1989. Batista observed that there was indeed a blind spot in the front area of the subject trucks. He also concluded that the truck driver did not blow his horn before moving from the crusher area and that this constituted a "serious and substantial" violation of the cited standard. In reading his conclusion Batista was aware that the employees, including the subject truck driver, had signed a statement acknowledging the requirement of blowing their horn before moving their vehicles, but Batista found that this procedure was not enforced at the plant.

MSHA Inspector Roberto Torres testified that he met with Puerto Rican Cement officials in February 1989, to discuss new MSHA regulations including the requirement for truck drivers to blow their horns before moving their trucks.

Julio Salugo, an engineer for Puerto Rican Cement acknowledged that although they have a disciplinary procedure for safety violations none of the truck drivers had been disciplined before the accident at issue for failure to blow their horns before moving their trucks. He testified that subsequent to the accident there has been some disciplinary action taken.

Former Puerto Rican Cement employee, Freddie Irizarry, testified that while he was employed with the company there was indeed a disciplinary procedure in effect. He explained that on the first notice of a violation the employees was told how to correct the violative act. The second time a warning was issued and the employee could be suspended or "other appropriate action" could be taken by management.

Within this framework of evidence it is clear that the violation is proven as charged. The testimony of eyewitness Angel Torres is not disputed that as the subject truck left the crusher its horn was not blown nor was "other effective means [used] to warn all persons who could be exposed to a hazard from the equipment". Clearly the violation was also "significant and substantial". A violation is "significant and substantial" if there is an underlying violation of a mandatory standard, the existence of a discrete hazard contributed to by the violation, a reasonable likelihood that the hazard contributed to will result in an injury, and a reasonable likelihood that the injury in question will be of a reasonably serious nature. Mathies Coal Company, 6 FMSHRC 1 (1984). The failure to give an audible or other effective warning upon leaving the crusher area in the vicinity of pedestrian traffic clearly meets this criteria. The violation was particularly serious because of the blind area from the cabs of the subject trucks.

Puerto Rican Cement argues that it should not be chargeable with significant negligence because it had trained and disciplined its employees in the requirements of the cited standard. Indeed the evidence does show that at a training class held in February 1989 the specific subject matter of an audible warning prior to trucks moving was covered. Moreover following that class the truck drivers signed a statement acknowledging that requirement. The evidence shows however that the truck drivers thereafter regularly ignored that requirement without discipline before the accident here at issue.

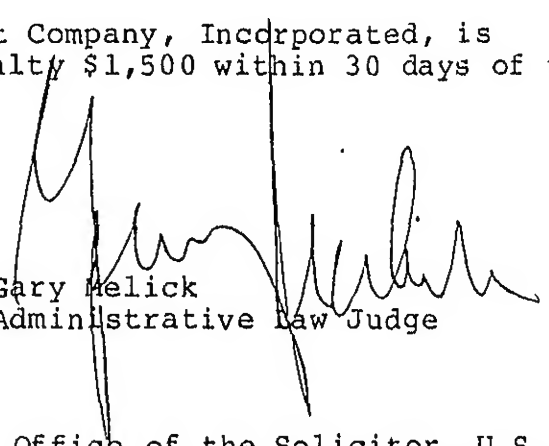
According to truck driver Angel Torres he did not in fact issue any audible or other alarm before moving his truck so long as he did not see anyone in front. He has acknowledged moreover that he had never been disciplined for this practice. In light of the evidence that there is an obstructed view from these trucks of approximately 43 feet to the front and to the right of the driver's position it is clear that the procedure followed by Mr. Torres was particularly dangerous. The evidence also shows that no driver had been disciplined prior to this accident for failing to issue an audible or other warning prior to moving their trucks. Indeed the persuasive evidence is that there was not in effect at this mine an effective means of enforcing the alleged rule for an audible warning prior to

moving the trucks. Accordingly the operator is chargeable with negligence.

In assessing a civil penalty in this case I have also considered the operator's size, history of violations and good faith abatement of the violation. Under the circumstances I find that a civil penalty of \$1,500 is indeed appropriate.

ORDER

The Puerto Rican Cement Company, Incorporated, is directed to pay a civil penalty \$1,500 within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge

Distribution:

James A. Magenheimer, Esq., Office of the Solicitor, U.S.
Department of Labor, 201 Varick Street, Room 707, New York,
NY 10014 (Certified Mail)

Daniel R. Dominguez, Esq., Dominguez & Totti, Puerto Rican
Cement Company, Inc., P.O. Box 1732, Hato Rey, PR 00919
(Certified Mail)

nb

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF
ERNEST EUGENE WHITE,
Complainant
v.

PEABODY COAL COMPANY,
Contestant
v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

Y.

: DISCRIMINATION PROCEEDING
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: Docket No. WEVA 90-13-D
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: OTC&I-CD-89-14
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: Sundial No. 10-B Mine
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: Sundial No. 10-B Mine
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Appearances: Edward H. Fitch, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for
the Secretary of Labor;
Thomas L. Clarke, Esq., Charleston, West Virginia,
for Peabody Coal Company.

These three actions, under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., turn on the issue

whether section 103(f) of the Act was violated when the operator refused to pay a walkaround representative designated to accompany a federal mine inspector. The inspection party included a federal inspector and a West Virginia mine inspector, and concerned a roof fall at Peabody's No. 10-B Mine. The operator paid the miner designated by the miners' representative as the walk-around to accompany the West Virginia mine inspector, but refused to pay the walkaround designated to accompany the federal mine inspector, contending that one paid walkaround was all that was required under section 103(f).

The parties have filed cross-motions for summary decision based upon a stipulated record.

DISCUSSION

It is stipulated that on May 16, 1989, the Mine Safety and Health Administration (MSHA) and the West Virginia Department of Energy (WVDOE) jointly conducted an investigation of a roof fall at Peabody Coal Company's No. 10-B Mine.

Ernest Eugene White, in his capacity as the Union Mine Safety Committee Chairman, designated Bob Holstine, President of UMWA, Local Union 2271, as the walkaround representative of miners to accompany the state inspector; he designated himself as the walkaround to accompany the federal inspector. The inspection party consisted of Jim Cline, an MSHA inspector, Danny Graham, A WVDOE mine inspector, Bob Holstine and Ernest Eugene White, representatives of the miners, and representatives of management.

After the investigation, the federal and state inspectors issued separate citations under their respective mine laws and regulations.

Peabody paid Bob Holstine for the time he spent on the inspection, but took the position that its payment of Mr. Holstine satisfied its obligation under federal law to provide walkaround pay to only one miners' representative per inspection. It therefore refused to pay Ernest Eugene White walkaround pay. The Secretary of Labor contends that Mr. White was entitled to participate in the investigation and to be paid as a walkaround in a federal inspection.

Section 103(f) of the Act provides in part:

[A] representative authorized by [the] miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine . . . for the purpose of aiding such inspection and to participate in pre- and

post-inspection conferences held at the mine. . . . Such representative of the miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection To the extent that the Secretary or the authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one representative of the miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of participation

Under this section, the miners are entitled to have at least one walkaround representative on each federal inspection of a coal mine. The section also gives the MSHA inspector the authority to determine the number of additional walkarounds that would aid in his inspection and the discretion to limit the number of walkarounds. Secretary of Labor on behalf of Wayne v. Consolidation Coal Company, 11 FMSHRC 483 (1989). An operator is required to give at least one miners' representative, and as many more as an inspector has determined would aid in his inspection, the opportunity to accompany the inspector. The miners have the right to determine who shall be given the opportunity to serve as their walkaround representatives. Secretary of Labor on behalf of Truex v. Consolidation Coal Company, 8 FMSHRC 1293, 4 MSHC 1130 (1986). However, section 103(f) requires that only one walkaround representative suffer no loss of pay for his or her time spent on an inspection. If an MSHA inspector chooses to permit more than one miners' representative to accompany an inspection party, as provided in section 103(f) of the Act, there is no federal law or regulation to guide an operator as to which of the miner's representatives must suffer no loss of pay.

In this case, the MSHA inspector permitted two representatives of the miners to take part in the May 16, 1989, inspection, even though he found that only one was necessary. Ernest Eugene White, as the Union Safety Committee Chairman, designated Bob Holstine, President of UMWA, Local Union 2271, as the miners' representative to accompany Mr. Graham, the West Virginia mine inspector; he then designated himself as the miners' representative to accompany the federal inspector. Peabody paid Mr. Holstine for the time he spent on the inspection, but refused to pay Ernest Eugene White, contending that it had complied with its obligation under section 103(f) to ensure that one of the walkarounds suffered no loss of pay.

The law of West Virginia gives an authorized representative of miners walkaround rights similar to the federal rights of walkarounds (West Virginia Code § 22A-1A-12). The Supreme Court of West Virginia has held that withholding compensation from a

designated walkaround representative is prohibited by the state's anti-discrimination statute. UMWA v. Miller, 291 S.E. 2d 673 (1982). Similarly, it is a violation of the federal anti-discrimination law, section 105(c)(1) of the Act,¹ to refuse to pay an authorized walkaround for his or her time spent in accompanying a federal mine inspector. Truex v. Consolidation Coal Co., 8 FMSHRC 1293, 1298, 1300 (198); and Stillian v. Quarto Mining Co., 12 FMSHRC 932, 936 (1990).

The Secretary contends that as Chairman of the Mine Safety Committee, Ernest Eugene White properly exercised his responsibility when, after being told by the MSHA inspector that only one miners' representative was necessary, he proceeded to go on "union business" in order to participate in the federal inspection. He later filed a section 105(c) complaint of discrimination under the Act. The Secretary contends that both sections 103(f) and 105(c) were violated by Peabody's failure to compensate White as a walkaround to accompany the federal inspector.

Peabody contends that since both the federal and state inspectors were investigating the same roof fall, it complied with the federal law by compensating only one miners' representative as a walkaround.

If Peabody had paid Mr. White, rather than Mr. Holstine, there would have been compliance with section 103(f) and no

¹Section 105(c)(1) of the Act provides:

"No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act."

violation of section 105(c), since Mr. White was the designated walkaround to accompany the federal inspector. In that situation, the miners would have had to pursue their claim for Mr. Holstine under state law.

If the state and federal inspectors had separately investigated the roof fall on different dates, there is no question that Peabody would be required to compensate a walkaround for each inspection under the respective federal and state laws. I hold that the fact that the inspectors appeared on the same day does not alter this responsibility.

Under federal and West Virginia laws, the miners are entitled to have their representatives participate in mine safety and health inspections conducted by the respective government agencies, whether or not a mine inspection is separately or "jointly" conducted. In any inspection, and particularly in an accident investigation, the miners are entitled to be confident that both federal and state agencies are fulfilling their obligations in determining what actually occurred and in reaching proper conclusions as to measures necessary to prevent future risks to miners. In the case of a roof fall, for instance, each agency's inspector will observe and analyze the facts through his own eyes and in his own way. While federal and state inspectors may discuss their observations with each other and with the other members of the inspection party, they must reach their own independent conclusions. A miners' walkaround should not have to try to monitor both a federal and a state inspector at the same time. Each inspector has a separate statute and set of regulations to enforce, and each has separate factual findings to make and separate laws, orders, citations, etc., to consider.

The federal and state rights of miners to participate in inspections should be read in harmony with each other, and not interpreted so as to favor one benefit to the exclusion of the other. Miners' representatives participating in a "jointly" conducted inspection should be able to concentrate on participating effectively in the separate federal and state inspections that are actually taking place.

Accordingly, I hold that Peabody violated sections 103(f) and 105(c)(1) by refusing to compensate Mr. White as a walkaround to accompany the federal inspector. ²

² After Citation No. 2723186 was issued, Peabody abated the cited violation of section 103(f) by paying White compensation as a walkaround in a federal inspection. However, this was not an admission of a violation, and Peabody preserved its right to challenge the citation before the Commission.

Considering the criteria for a civil penalty in section 110(i) of the Act, I find that a penalty of \$20 is appropriate for Peabody's violation of sections 103(f) and 105(c)(1) of the Act.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citation No. 2723186 is AFFIRMED.
2. Peabody Coal Company shall pay a civil penalty of \$20 for its violation of sections 103(f) and 105(c)(1) of the Act.


William Fauver
Administrative Law Judge

Distribution:

Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203 (Certified Mail)

Thomas L. Clarke, Esq., Peabody Coal Company, P.O. Box 1233, Charleston, WV 25324 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 17 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 90-75
Petitioner	:	A. C. No. 15-11417-03514
v.	:	
	:	No. 2 Prep Plant
SHAMROCK COAL COMPANY, INC.,	:	
Respondent	:	Docket No. KENT 90-60
	:	A. C. No. 15-02502-03558
	:	
	:	Shamrock No. 18 Series
	:	

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor,
U. S. Department of Labor, Nashville, Tennessee,
for the Secretary;
Neville Smith, Esq., Smith & Smith, Manchester,
Kentucky, for the Respondent.

Before: Judge Weisberger

Statement of the Case

These cases are before me based upon Petitions for Civil Penalty filed by the Secretary (Petitioner) for alleged violations by the Operator (Respondent) of various mandatory safety standards set forth in Volume 30 of Code of Federal Regulations. Pursuant to notice, Docket No. KENT 90-60 was heard in Richmond, Kentucky, on June 7, 1990. John H. Linder testified for Petitioner, and Gordon Couch testified for Respondent. In a telephone conference call on August 8, 1990, counsel for both Parties waived their right to submit a Brief and Proposed Findings of Fact.

On September 4, 1990, Petitioner filed a Joint Motion to Approve Settlement concerning the Citations that are the subject matter of Docket No. KENT 90-75.

Stipulations

At the hearing, the Parties stipulated as follows: "That the proposed penalty will not affect the operations of the business as would be appropriate, the size of the business, and that the Operator has indicated he will comply to nullify the violations." (sic) (Tr 6). It was also stipulated that that the mine in question produced 768,543 tons of coal in the 24 month period preceding the citations at issue, and that Respondent's total operations produced approximately 22 millions tons of coal in that period.

Findings of Fact and Discussion

Docket No. Kent 90-75

Citation Numbers 2999139 and 3005741

Petitioner has filed a Joint Motion to approve a settlement agreement in this case. A reduction in penalty from \$121 to \$40 is proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. The Motion for Approval of Settlement is GRANTED.

Docket No. KENT 90-60

Citation No. 3205519

On September 20, 1989, MSHA Inspector John H. Linder, while performing an inspection of Respondent's No. 18 Mine, observed four miners cleaning belts and inquired of them whether they had self-contained self-rescue devices. According to Linder, the miners indicated that these items were located at the head-drive. Linder then went to the area of the head-drive along with Respondent's Inspector Hurchal Asher, and was able to locate only one such device. Linder issued a citation, Number 3205519, alleging a violation of 30 C.F.R. § 75.1101-23 which requires operators, in essence, to adopt an evacuation plan. The plan provides for maximum distances between underground miners and the location of self-contained self-rescue devices. Linder's testimony established that there were no self-contained self-rescue devices for each of the four miners, who were cleaning belts, within the maximum distance specified by the plan. (Gx 3, Pages 6-8). Respondent did not contest Linder's testimony, and indicated that it did not contest the violation. I thus find that Respondent herein did violate Section 75.1101-23, supra, as alleged.

In the citation, Linder indicated that the violation herein was significant and substantial. As set forth by the Commission in Mathies Coal Company, 6 FMSHRC 1 (January 1984), the Commission set forth the elements of a "significant and substantial" violation as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and, (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. (6 FMSHRC, supra, at 3-4.)

Further, as explained by the Commission in U. S. Steel Mining Company, 6 FMSHRC 1834, 1836 (August 1984), the third element of the above formula set out in Mathies, supra, "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is injury." Linder, in his testimony, did not specifically explain his conclusion in the citation that the violation herein was significant and substantial. Linder indicated that the self-contained self-rescue device supplies oxygen for an hour, and thus would allow a miner using it to breathe, should there be an explosion or liberation of methane gas. He indicated that in contrast, the miners on the date in question had filter type rescuers that did not provide oxygen, and which could not be used for some poisonous gases. He indicated that belt lines, which were present in the area in question, are a source of a fire hazard as their rollers can lock at any time. In this connection, he indicated that coal spilling off a belt can pile up over the rollers causing them to heat, which would then cause a fire. He indicated that there were additional ignition sources such as the existence of electrical power lines along the sides of the belt and electrical switches at different locations. With regard to the liberation of methane, he indicated that in the seam in which the mine in question is located, "usually" methane is potentially present in small amounts (Tr. 21). He also indicated that in the subject mine, he was not aware of any methane releases in the explosive range. I find that although there were possible ignition sources present, there is no evidence as to the specific conditions of the sources, upon which to base a conclusion that any ignition was reasonably likely to occur. Thus, although there was some hazard to the miners in the section in question, as a result of not having been provided with rescuers that could supply oxygen in the event of a fire or an explosion, the evidence fails to

establish that there was any "reasonable likelihood" that the hazard contributed to would result in an injury-producing event. (U. S. Steel Mining Co., supra.) Accordingly, I conclude that it has not been established that the violation herein was significant and substantial. Gordon Couch, Respondent's safety director, indicated that exposure to carbon monoxide at a level of a half percent is immediately fatal. He indicated that the self-rescuer device worn by the miners in question is designed to protect, for up to an hour, exposure to one percent of carbon monoxide. Essentially, according to Couch, if as a consequence of a fire or explosion, there remained sufficient oxygen to support life, then the device worn by the miners would allow them to breathe, and thus be able to travel out of the mine. Essentially, he indicated that the self-contained self-rescue units, which did provide oxygen, were not more effective. He indicated that if a fire or explosion would reduce the oxygen below the level needed to sustain life, then neither the device worn by the miners nor the self-contained self-rescue units would help, as any miner present would not survive such an event. In contrast, he indicated that should a fire or explosion leave sufficient oxygen to sustain life, then either device would be adequate to allow the miners present to escape.

I find that Respondent has not contradicted or rebutted the testimony of Linder that the device worn by the miners can not be used to filter out some poisonous gases. Further, I find persuasive the testimony of Linder that in a "big" fire the self-contained self-rescue device, which allows one wearing it to breathe oxygen, is "real important," and in an explosion one would not have a chance without such a unit (Tr. 23). Accordingly, I reject the testimony of Couch, and conclude that the violation herein was moderately serious. There is no evidence before me to base a conclusion that Respondent herein either knew or should have reasonably known that there were not sufficient rescue devices, at the appropriate sites, as mandated by its fire evacuation plan. Accordingly, I conclude that it has not been established that Respondent herein acted with more than a low degree of negligence with regard to the violation herein. Taking into account the remaining factors of Section 110(i) of the Act, as set forth in the Parties' stipulations, I conclude that a penalty of \$100 is appropriate for the violation found herein.

Citation 3206149

On October 3, 1989, Linder cited Respondent for a violation, of 30 C.F.R. § 75.1100-2(i)(1), alleging that certain required fire fighting equipment was not provided for the 005 working section, which had exceeded a depth of 2 miles from the surface.

At the hearing, Respondent conceded the violation and that the mine did produce more than 300 tons per shift and that the area in question was at a depth of more than 2 miles. Inasmuch as Respondent does not contest the violation cited by Linder, I find Respondent violated Section 75.1100-2(i)(1), supra, as alleged.

Linder indicated, in the citation, that the violation was significant and substantial. He indicated, in his testimony, that the purpose of the requirement for the provision of certain emergency materials was to enclose an area to keep gas out in the event of an explosion, or to conserve oxygen in the event of a roof fall. In this connection, he described the roof conditions as average. Also, he indicated that the belt conveyor was a source for a fire along with equipment in the area, such as continuous miners, scoops, motors, bolters, and high voltage cables, all of which he termed as potential sources of fire. He indicated that an illness or injury could result in the event of an explosion if the necessary materials were not present. However, he indicated that in the absence of an explosion, the lack of such required materials in and of itself would not reasonably likely cause an illness or injury.

Inasmuch as Linder did not offer any facts to substantiate his conclusion, as set forth in the Citation, that the violation was significant and substantial, and inasmuch as the record fails to establish that the hazards contributed to by the lack of the emergency equipment, were not reasonably likely to occur, I conclude that the violation herein has not been established to be significant and substantial. (Mathies, supra.) Although some of the required materials were available at the section, they were being used at the face. Further, according to Couch, certain materials were not present in the quantities mandated by Section 75.1100(a)(2)(i)(1), supra. Thus, he indicated that there was lacking 1000 feet of lumber and five full tons of rock dust. He indicated that he doubted that the quantity of nails required were present, and whether there were two complete unused rolls of brattice cloth.

Inasmuch as the emergency materials, which were not on the section, were to be used, as testified to by Linder and not contradicted by Respondent, to conserve oxygen in case of a roof fall and to keep gas away in the event of an explosion, I conclude that the violation herein was moderately serious.

According to the testimony of Linder, and not contradicted by Respondent, around May or June 1990, he had spoken to Steven Shell, Respondent's safety inspector, with regard to emergency materials, and the latter told him that ". . . he was going to continue to work on it trying to get the materials." (sic) (Tr. 44). Shell also told Linder that another MSHA Inspector,

Denver Rich, also spoke to him about having emergency materials at the 2 mile depth. Thus, I find that Respondent was aware of the necessity of having emergency material once the work section had reached 2 miles from the surface. Accordingly, I find Respondent was negligent to a moderately high degree in not having the required materials present. I conclude that a penalty of \$150 is appropriate for the violation found herein.

Citation 3206154

On October 5, 1989, Linder, while walking in a crosscut, at the No. 9 Section, between Entries 3 and 4, observed dust in the air, and "there wasn't nothing moving." (sic) (Tr. 65). Linder timed the movement of the air, by using a smoke club, at 4604 cubic feet per minute, between Entries 3 and 4 in the crosscut, which was the last crosscut in an inby direction before the working face. According to Linder, a roof bolter was located at the end of Entry No. 1, a continuous miner was located at the end of Entry No. 5, and that these two areas were the working faces or working places. The crosscut in which Linder measured the movement of air, ran between Entries 1 and 6, and was the last crosscut in an inby direction prior to the working faces. At the time of Linder's inspection, intake air entered the crosscut in question from Entries 5 and 6, and then coursed in the direction of Entry No. 1 where it turned outby and became return air. Air also returned outby and down Entries 2 and 3 as curtains were down in those entries. At the time of Linder's inspection, a line curtain was hanging in the crosscut in question between Entries 4 and 5. At the date in question, as explained by Couch, the Entries 5 and 6 were development entries. However, he also indicated that as part of the normal mining cycle, the continuous miner takes 30 foot cuts and moves from Entries 5 to 4 to 3 to 2 to 1, respectively.

Linder issued a citation alleging a violation of 30 C.F.R. § 75.301 in that only 4604 cubic feet per minute was reaching the last open crosscut between the No. 3 and 4 Entries. Section 75.301, supra, as pertinent, provides that the minimum quality of air reaching the last open crosscut ". . . in any pair or set of developing entries" shall be 9000 cubic feet per minute.

Essentially, it is Respondent's position that it did not violate Section 75.301, supra, as the movement of air was not tested at the proper place. In this connection, Respondent refers to the testimony of Couch that the air should have been tested in the crosscut between Entries 4 and 5, as these were the development entries. Couch also referred to the fact that the crosscut, between Entries 4 and 5, was closed with a curtain. Essentially, Couch also referred to Section 75.301, which set forth its purpose in requiring a flow of 9000 cubic feet a minute.

The stated purpose of this requirement is to render harmless methane when coal is being cut, mined or loaded. Accordingly, Couch indicated that it would not be desirable to have air flowing at 9000 cubic feet a minute to the left of Entry No. 5, and going in the direction of Entry No. 1, as air leaving the continuous miner in Entry No. 5 would contain dust and fumes. For the reasons that follow, I do not agree with Respondent's arguments, and find that the areas, in which Linder tested the volume of air, was in the last open crosscut, and the volume of air tested was below the maximum required by Section 75.301, supra.

In Jim Walter Resources, Inc., 11 FMSHRC 21 (January 1989) the Commission, in analyzing the term "last open crosscut," for purposes of deciding whether a violation of 30 C.F.R. § 75.500(d) occurred, took cognizance of the fact that a "crosscut" ". . . is recognized to be a passageway or opening driven between entries for ventilation and haulage purposes." (Jim Walter, supra, at 26). Further, in Jim Walter, supra, at 26, the Commission found that a "last open crosscut" is that open passageway connecting entries closest to the working face. The Commission also noted the following definition of "working face" as set forth in Section 318(g)(1) of the Federal Mine Safety and Health Act of 1977, and 30 C.F.R. § 75.2(g)(1) as follows: "any place in a coal mine in which work of extracting coal from its natural deposit in the earth during the mining cycle is performed" The Commission in Jim Walter, supra, was presented with the issue, for purposes of applying 30 C.F.R. § 75.1710-1, of whether certain equipment was "permissible." The Commission referred to Section 318(i)(8) of the Act as defining "permissible electric face equipment" as those electrically operated equipment taken into or used in by the last open crosscut. With regard to the term "last open crosscut" the Commission in Peabody Coal Company, 11 FMSHRC 4, 8 (January 1989), found as follows: "In general, the last open crosscut thus refers to the last (most inby) open passageway between entries in a working section of a coal mine. The last open crosscut 'is an area rather than a point of line . . . ' Henry Clay Mining Company, 3 IBMA 360, 361 (1974)." The Commission, in Peabody, supra, at pages 8-9, found that a determination by the Trial Judge of the boundaries of the area of the last open crosscut to be demarcated by, inter alia "air flow across the developing entries of a working section," to comport with commonly accepted mining terminology.

Applying the rationale of Peabody, supra, and Jim Walters, supra, to the case at bar, I conclude that, inasmuch as during the course of the normal mining cycle, coal will be extracted from the face of No. 4 and No. 3 Entries, it follows that the last crosscut before the face, between these two entries, is to be considered the last open crosscut (See also, Consolidation Coal Company, 3 FMSHRC 678, 685-686 (1981)) (Judge Cook). As

such, I find that Linder took air measurement readings at the proper location. Respondent has not refuted the testimony of Linder that, in the last open crosscut between the 3rd and 4th Entries on the date in question, there were only 4604 cubic feet per minute of air. Inasmuch as 9000 cubic feet per minute is required by Section 75.301, supra, I conclude that Respondent herein did violate that section.

The Citation issued by Linder denotes the violation as being significant and substantial. Linder did not testify at all with regard to the facts upon which he based this conclusion. Nor did his testimony at all refer to the characterization of the violation as significant and substantial. I thus conclude that it has not been established by Petitioner that the violation herein was significant and substantial. (See Mathies, supra.)

According to the uncontradicted testimony of Linder, when he observed that there was nothing moving in the air in the last open crosscut between the 3rd and 4th Entries, he told this to the foreman Terry Couch. The latter indicated that a curtain had been torn down by a scoop, and that he would replace those curtains that have been denoted on Gx 9 with a red circle as having been torn. The record does not indicate when the tearing of the various curtains had occurred. I conclude that it has not been established that Respondent acted with more than moderate negligence in connection with the violation.

As set forth in Section 75.301, supra, the purpose of sufficient ventilation is to ". . . dilute, render harmless and to carry away, flammable, explosive, noxious, harmful gases, dust, smoke, and explosive fumes." Thus, inasmuch as the measured air of 4604 cubic feet per minute was significantly below the requirement in Section 75.301, supra, of 9000 cubic cubic feet per minute, I conclude that the violation herein was of a moderately high level of gravity. I conclude that Respondent shall pay a penalty of \$175 for the violation found herein.

Citation 3206155

On October 12, 1989, Linder issued a citation alleging a violation of 30 C.F.R. § 75.1101-10 in that the water sprinkler system at the 005 working section head-drive did not stop the belt conveyor or give an audible or visible alarm when tested. In his testimony he explained that it was not hooked up to the power source, and as such could not either stop the belt in the event of a fire, or provide an audible or visible alarm. Respondent did not contradict Linder's testimony, and indicated that it conceded the violation. Accordingly, based upon this concession as well as the evidence before me, I conclude that Respondent herein did violate Section 75.110-10, supra, as alleged.

In the Citation issued by Linder, it was indicated that the violation was significant and substantial. Linder did not make any reference in his testimony to his conclusion that the violation was significant and substantial. Nor did Linder adduce any facts in his testimony which would tend to support such a conclusion.

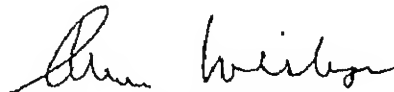
Linder indicated that at the time the violation was cited, the belt was in operation, and in the event of a fire, the sprinkler system, being unplugged, would not have been able to stop the belt and prevent the fire from spreading. He agreed that coal dust is a hazard, and that belt rollers tend to stick and heat up, and that if coal dust piles up around the rollers, a fire could result. He indicated that in such an event, fire could spread to the belt drive, and "it could be carried around" (Tr. 103). I find this evidence insufficient to establish that there was a reasonable likelihood of a fire occurring.

I thus conclude that it has not been established by Petitioner that the violation herein was significant and substantial. (See, Mathies, supra; U. S. Steel Mining Co.).

There is no evidence before me to indicate how long, prior to Linder's inspection, the water sprinkler system was unhooked. Nor is there any evidence to establish that Respondent either knew, or should have been aware, of this condition. Hence, I conclude that Respondent's negligence, in connection with this violation, was only low. The sprinkler system extended only 50 feet along the head of the belt. However, in addition, there was a fire sensor line all along the belt which would give a warning siren in the event of a fire. Although this device would not shut off the belt, it could be shut off at the head-drive by a switch, or could be shut off from the outside. I thus find that the gravity of the violation was only moderate. I conclude that a penalty of \$100 is appropriate for this violation.

ORDER

It is ORDERED that Respondent shall, within 30 days of this Decision, pay \$883¹/ as a Civil Penalty for the violations found herein.



Avram Weisberger
Administrative Law Judge

¹/ Included in this figure is a penalty of \$318 for the violations alleged in Citation Nos. 3206153 and 3206157 which were not contested by Respondent in its Answer.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 17 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 90-11-M
Petitioner	:	A.C. No. 11-00136-05505
v.	:	
	:	Valley Plant No. 7
MOLINE CONSUMERS COMPANY,	:	
Respondent	:	

DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor,
U.S. Department of Labor, Chicago, Illinois, for
the Petitioner;
James R. Papenhausen, Safety Director, Moline
Consumers Company, Moline, Illinois, for the
Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). Petitioner seeks a civil penalty assessment in the amount of \$160 for an alleged violation of mandatory safety standard 30 C.F.R. § 56.14107. The respondent filed a timely answer contesting the alleged violation, and a hearing was held in Moline, Illinois. The parties were given an opportunity to file posthearing briefs. The Petitioner opted not to file a brief, but the respondent filed a letter stating its position. I have considered this argument, as well as the arguments made by the parties during the hearing in my adjudication of this matter.

Issues

The issues presented in this proceeding are (1) whether the respondent violated the cited mandatory safety standard, and if so, (2) the appropriate civil penalty to be assessed pursuant to the civil penalty assessment criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301, et seq.
2. Sections 110(a) and 110(i) of the Act.
3. Commission Rules, 29 C.F.R. § 2700.1, et seq.

Stipulations

The parties stipulated to the following (Exhibit ALJ-1):

1. The Federal Mine Safety and Health Review Commission has jurisdiction over these proceedings.
2. Respondent's operation affects interstate commerce.
3. The Valley Quarry does not ship out of Illinois.
4. Respondent owns and operates the Valley Plant No. 7.
5. The Valley Plant No. 7 extracts limestone which is crushed and broken.
6. Respondent worked 16,097 manhours from October 16, 1988 through October 16, 1989 at the Valley Plant No. 7.
7. Respondent worked 430,086 manhours from October 16, 1988 through October 16, 1989 at all of its mines.
8. Moline Consumers Company is a corporation.
9. Respondent had four violations in the preceding 24-months ending on October 16, 1989.
10. On June 21, 1989 an Inspector from the Federal Mine Safety and Health Administration conducted an inspection on the Valley Plant No. 7.
11. On June 21, 1989, Citation No. 3258150 was issued to respondent. (ALJ Exhibit 1-(A)).
12. On August 14, 1989, a section 104-b Order No. 3259254 was issued to respondent. (ALJ Exhibit 1-(B)).
13. A proposed assessment was issued to respondent on October 16, 1989. (ALJ Exhibit 1-(C)).
14. A proposed assessment of \$160 would not affect respondent's ability to continue in business.

Discussion

Section 104(a) non-S&S Citation No. 3258150, June 21, 1989, cites an alleged violation of mandatory safety standard 30 C.F.R. § 56.14107, and the cited condition or practice states as follows: "The 'V' belt drive that powers the primary crusher motor was not provided with a guard. The crusher was operating at the time of this observation."

The inspector fixed the abatement time as 8:00 a.m., June 26, 1989.

On August 14, 1989, section 104(b) withdrawal Order No. 3259254, was issued because of the alleged failure by the respondent to provide a guard for the cited belt drive in question within the time fixed for abatement. The order was terminated within 40 minutes after it was issued after the respondent provided a guard for the cited piece of equipment.

Petitioner's Testimony and Evidence

MSHA Inspector Jimmie L. Davis confirmed that he conducted an inspection at the respondent's mine on June 21, 1989, and after observing that the primary crusher V-belt drive was not guarded, he issued the contested citation. He explained that there was a gate at the crusher location, but it was partially opened and unlocked. He identified photographic exhibits P-1 through P-6 as the cited crusher in question. The lock was a key padlock, and the crusher was running and operating at the time of the inspection, and the crusher operator was in the crusher booth approximately 10 to 12 feet above the crusher location, as shown in exhibit P-3 (Tr. 9-11).

Mr. Davis stated that the citation was non-S&S, but that the unlocked gate presented a hazard in that "somebody could get in through the pinch point of the V-belt drive" (Tr. 11). He cited a violation of section 56.14107, because the guard was not in place and a person could come in contact with the pinch point. He confirmed that if he had found the gate locked with a padlock, rather than bolted shut, he would have still issued a citation because MSHA's policy, as explained to him, is that padlocks are not acceptable as guards. If the gate had been bolted, he would not issue a citation. If the guard were in place around the V-belt drive, and the gate were padlocked, he would not issue a violation (Tr. 13).

Mr. Davis explained that a bolted gate would be acceptable in lieu of a guard around the individual crusher components because a bolted gate provides a barrier or barricade preventing anyone from entering the crusher area. A bolt with a nut inserted into the gate to hold it together so that a wrench would be needed to remove it would be acceptable as a guard (Tr. 14).

Mr. Davis stated that plant superintendent Jeff McGee, who accompanied him during the inspection, advised him that the crusher operator had the key to the padlock, but Mr. McGee could not explain why the gate was unlocked, and he surmised that the crusher operator had done some work greasing, oiling, or checking the crusher and failed to lock the gate (Tr. 15).

Mr. Davis stated that he based his gravity finding of "unlikely" on the fact that no one was in the crusher area at the time he observed the cited condition, but he believed that an injury would be "permanently disabling" if someone had come in contact with the pinch point. If this had occurred, "an arm could have been cut off or a leg. They would have been mangled up" (Tr. 16). One person would be exposed to the hazard while cleaning up or greasing in the crusher area (Tr. 16).

Mr. Davis stated that he based his "moderate" negligence finding on the fact that the crusher gate was the only gate on the property being used as a guard. All other moving machine parts at the site were properly guarded with guards in place at the individual pinch points, and in view of this, he believed that the respondent should have known that the crusher V-belt drive should have been guarded (Tr. 17).

On cross-examination, and in response to a hypothetical question, Mr. Davis confirmed that if he had a storage shed on his property, he would prefer to secure it with a padlock rather than a bolt because he would be the only person with a key, he could control access to the shed, and he would probably be the only person there (Tr. 19). He confirmed that in the normal course of business, no one other than the crusher operator would be expected to be close to crusher. He confirmed that he did not see the key and did not ask the crusher operator about it (Tr. 21).

Mr. Davis explained that the use of a bolt provides a barrier to the crusher area, and he conceded that any guarding device which is easier to remove and replace would more likely be replaced once it has been removed (Tr. 24). According to his training, one bolt would constitute a permanent barrier, as long as it is the proper size and length so that it can be used with a nut (Tr. 24).

Mr. Davis stated that even though the crusher operator was in his booth, it was possible for someone else to gain access to the crusher, and this would pose a hazard. Although he made no determination in this case that a supervisor would walk into the area to visit the crusher operator, he believed that a supervisor who is responsible for the safe operation of the crusher is supposed to check it, and he could visit the crusher area with the gate unlocked. If he were to travel inside the gate area,

near the unguarded pinch point, he would be exposed to a hazard (Tr. 27). Mr. Davis confirmed that he interviewed the supervisor, but did not ask him if he ever walked into the crusher area while it was operating (Tr. 27). When asked whether he made any determination that anyone else would likely walk through the unlocked gate while the crusher operator was in his booth, Mr. Davis stated that the only person present was the loader operator, and if he had observed someone cleaning in the crusher area, he would have issued an "S&S" citation (Tr. 28).

Mr. Davis identified a ladder shown in some of the photographs, and he explained that it is used by the crusher operator to reach his booth. He stated that the ladder "goes by the place in question" (Tr. 28). He stated that a supervisor has a duty to conduct a walkaround inspection of the crusher area while it is operating, but that he would not have to walk inside the gate area to do this, and would not have to use the walkway into the crusher area if he were simply there to speak to the crusher operator (Tr. 29).

MSHA Inspector Robert Flowers, confirmed that he visited the site on August 14, 1989, to conduct a follow-up inspection with respect to the citation previously issued by Inspector Davis and that he was accompanied by Mr. McGee. Mr. Flowers stated that he found the crusher V-belt drive unguarded, but could not recall whether the gate in question was locked or open. He confirmed that he issued a section 104(b) order because the crusher V-belt drive had not been provided with a guard. Assuming the gate were locked with a pad lock, he would still have issued the order "because in our training and everything, we do not accept locked gates with a padlock as a guard" (Tr. 35). He would have accepted a bolted gate as a suitable guard because "the guide is that locked gates with a bolt become a permanent fixture" (Tr. 36). If there were no gate, and there was a proper guard over the belt drive, this would have been acceptable. The order was terminated after the superintendent installed a guard over the belt drive (Tr. 36).

Mr. Flowers stated that he informed Mr. McGee that MSHA does not accept padlocked gates as a guard and that the belt drive pinch point needed to be guarded with a guard. Mr. McGee then informed him that he had been instructed not to guard it and to simply post warning signs on the gate. Mr. Flowers confirmed that the signs were on the gate. Mr. McGee then called his supervisor, Mr. Marshall Guth, vice-president for operations, and Mr. Flowers spoke with him and explained MSHA's policy, and Mr. Guth instructed Mr. McGee to guard the pinch point. The guard was fabricated with two pieces of expanded metal and it was installed within 40 minutes. Mr. Flowers found it acceptable (Tr. 38).

Mr. Flowers confirmed that in the event he returned to the site, and found a bolt through the gate, rather than a guard over the belt drive, he would find this acceptable as long as it was a proper bolt which required the use of wrenches to remove it (Tr. 39). Mr. Flowers confirmed that the crusher operator was in his booth at the time of his inspection (Tr. 40).

Mr. Flowers stated that in his experience as an inspector, employees who work on a crusher would generally inspect it to see that it is operating properly, and would perform maintenance work on it to replace missing belts or to check for leaks (Tr. 40). He confirmed that he has observed a primary crusher in operation, and that people will inspect it from time to time during the day while it is running. If an employee were to walk into the area of an unguarded belt drive he would be exposed to a hazard while inspecting the crusher during any daily work shift (Tr. 41).

On cross-examination, Mr. Flowers stated that he was standing on the walkway next to the gate, but did not consider himself to be in any danger because he did not enter the crusher area. Assuming that the gate were locked, he could not have accidentally contacted any of the crusher pinch points, and he would have to go to a great deal of effort, or climb over the gate, to reach any pinch points (Tr. 43). A superintendent or anyone else walking around the plant would also experience the same difficulty in reaching the pinch point area. However, if the gate were bolted, rather than padlocked, the amount of effort to reach the pinch point area would be different because the individual would have to obtain a wrench to remove the bolt, or he would have to obtain a key if it were padlocked. Mr. Flowers agreed that a guard would more likely be replaced if it can be replaced easily instead of with difficulty. He also agreed that there was no remote way anyone could accidentally contact the drive in question with the gate locked (Tr. 44).

When asked about the practical difference between the use of a bolt and a padlock, Mr. Flowers responded "it's that you have a quicker access to the area with a padlock and a key than you do with a bolt and nut on it. You can get in and out faster and quicker" (Tr. 46). In response to further questions, he stated as follows (Tr. 46-47):

JUDGE KOUTRAS: There is only one key and the operator has specific policies and safety rules and controls, limited access. Would that make any difference.

THE WITNESS: We still have accidents from this type of incident.

JUDGE KOUTRAS: If there is only one key and only one man has access to it, he's up in his tower and the thing is padlocked, there is no way anybody can get in there. Is that right?

THE WITNESS: Should be.

JUDGE KOUTRAS: If a guy is up in the control tower and there is one bolt in it and somebody wanted to get in it, all they would have to do is take a wrench and open it up, and the fellow with the wrench can get into the area.

THE WITNESS: Yes.

JUDGE KOUTRAS: This theory about one bolt as opposed to a padlock, does that come from the notion that exposed pinch points and drives of this kind have to be permanently guarded? In other words, instead of guarding the particular "V" belt drive here, you take a larger guard, which is the size of a gate, and you put it out by that. You put a bolt in it, and that's sufficient. That provides a barrier from somebody getting in there. Is that the theory?

THE WITNESS: Yes.

JUDGE KOUTRAS: And a padlock is not that kind of a barrier then.

THE WITNESS: No.

JUDGE KOUTRAS: Is that policy written anywhere, this padlock versus --

THE WITNESS: No.

MSHA Supervisory Inspector Ralph D. Christensen, Peru field office, confirmed that he supervises Mr. Davis and Mr. Flowers, and is aware of the citation and order issued in this case. He stated that MSHA's policy is not to accept padlocks on gates as equipment guards. However, if the gate were bolted, it would be acceptable because "it becomes a barrier" (Tr. 51). He explained that a padlock is not acceptable because an operator can readily use a key and enter the area while a crusher is running, and that in his personal experience he has found numerous occasions where the locks are not locked. He stated that when he was hired as an inspector in 1978, he was informed by his supervisor during his orientation that a padlock is not an acceptable way of providing a guard for a pinch point. He confirmed that he has consulted with his district manager and with MSHA's chief of safety in

Arlington, Virginia, and they confirmed that padlocks are absolutely not acceptable as a guarding device (Tr. 53). Mr. Christensen stated that if the gate were locked and the belt was not guarded "we would have issued a violation because our history shows that they leave the lock unlocked and people can enter into the area at any time" (Tr. 53).

Mr. Christensen explained the purpose of a bolt as follows (Tr. 54):

A. The bolt on a gate turns the gate and that fence area into a wall, a barrier that's not readily accessible for employees to walk in there while it's running. They have to work on it to get in there, perhaps like a mechanic going in to service equipment. They unbolt guards to get in that equipment, and we would view this then as unbolting to get into the equipment to maintain it.

Q. Are you assuming that the equipment would be shut down?

A. They're required to lock out before they go into the area to do maintenance work.

Q. In other words, by "lock out," the crusher would not be operating, right?

A. Right.

Mr. Christensen confirmed that in the event a bolted gate is used to guard equipment such as a V-belt drive, if the gate is unbolted, this would constitute a violation of the standard cited in this case (Tr. 55).

On cross-examination, Mr. Christensen confirmed that bolted guards are left off "all the time" and that people do leave them off notwithstanding any MSHA or operator policies requiring them to be replaced (Tr. 55). In his opinion, access to a particular area can be better controlled by the use of a bolt rather than a padlock because an employee with a key can gain access into the area any time while the drive is running, but a crusher operator would not have a wrench because his duty is to see to it that the crusher does not become plugged and that the material is flowing. Maintenance men would normally carry wrenches. He estimated that it would take 5 seconds to unlock a padlock with a key, and 10 to 15 seconds to remove a bolt with a wrench (Tr. 56). The use of a bolt would restrict access to a crusher operator who normally has no business in the area because a maintenance man would generally take care of the drive unit (Tr. 57).

In the case of electrical lockout devices, Mr. Christensen stated that padlocks are used instead of bolts because the electrical boxes are designed for that purpose. If a box were designed for the use of a bolt, the use of the bolt would be illegal because anyone could remove the bolt at anytime and the person locking out the box with a bolt would not have control over anyone else removing it. By providing a lock, the person locking out the box has the only key and he is the only person in control (Tr. 58). A crusher operator with a key can unlock the gate and enter the area where the drive is running, and with a wrench, he could also enter the area, but it might take 10 seconds longer to do so (Tr. 58).

Oscar W. Ellis, respondent's president, testified that he has a degree in mining and engineering from the University of Arizona, and that he designed the primary crusher operation in 1980. He stated that the crusher platform is approximately 6 feet long and 16 feet wide, and he described the equipment located in that area (Tr. 62). He stated that the area was designed to provide adequate walking clearances and that it has a 2-foot wide walkway around the equipment to provide ready access to the equipment. He stated that "it would be stupid" for anyone to walk around that area with the crusher in operation because the pinch point would be dangerous, and he agreed that if someone were to circumvent the gate he could come in contact with a pinch point similar to a situation where an attached guard is removed from a particular pinch point (Tr. 64).

Mr. Ellis confirmed that he would expect the crusher operator to have a key to the padlocked gate in question, but he did not know who else would have one. He confirmed that a superintendent or maintenance personnel would not have a master key to all of the plant locks because many of the locks are not associated with master keys. He did not know whether extra keys to the gate in question would be available to anyone other than the crusher operator (Tr. 65). Mr. Ellis believed that the chances of someone being accidentally injured with the use of a padlocked gate or properly-designed guard over the pinch point "is virtually zero" (Tr. 65). He further believed that the possibility of any injury is greater by using a guard over the belt drive because such a guard would probably weigh 50 pounds and someone could twist their back lifting it if they were bent over and picked it up the wrong way (Tr. 66). He also believed that someone would more likely replace a guard which has been removed if its easier to do so (Tr. 67).

Mr. Ellis agreed that a bolt would be adequate, but he did not believe that it was as safe as using a lock. He alluded to equipment guards used in quarries which are provided with hinges and twist locks by the manufacturer to prevent access to the equipment. He agreed that if a bolt were taken off the gate, it would be the same as leaving a guard off, and that it would need

to be replaced. He confirmed that the only time anyone would be in the area which was cited in this case would be for the purpose of performing maintenance work, but the crusher would not be running and it would be locked out. He confirmed that his company policy is to have the gate locked and there is very little need for maintenance in that area. The gates were part of the initial design of the crusher plant and they were installed before the plant went into operation (Tr. 69). He pointed out that he tries to interpret MSHA's regulations "as best we can" and that he tries to provide a solution which is both practical and safe to prevent accidents (Tr. 70).

Mr. Ellis stated that at the time Mr. Davis conducted his inspection he (Ellis) was unhappy that the gate was unlocked and that Mr. McGee was specifically instructed to make sure the gate was always locked in accordance with company policy (Tr. 71). At the time Mr. Flowers visited the site, the gate was locked and warning signs were posted to emphasize the point to anyone who might go into that area (Tr. 71). He was not certain when any discussion with Mr. Davis over the use of padlocks may have taken place, and he believed that he had complied with the law and should not have been cited by Mr. Flowers in August. He also did not believe that the use of a bolt rather than a lock made much sense because he would have better control over who would go in and out of the cited area by using a lock rather than a bolt (Tr. 72). He confirmed that he now understands MSHA's theory with respect to the use of a bolt, but believes that it is incorrect (Tr. 73). He pointed out that there are many hinged equipment guards in use in quarries which are held in place by twist locks and they are not bolted (Tr. 73).

Mr. Ellis stated that a supervisor or foreman is instructed to make a complete inspection of the mine every day, and that he would walk around the crusher area and talk to the crusher operator. He could walk up to the booth by using the ladder, but he would not step off onto the platform, but would go directly to the booth. He confirmed that Mr. McGee is also a mining engineer and is a good and knowledgeable superintendent and would not tolerate any unsafe conditions. Mr. Ellis did not dispute the fact that the gate was unlocked when Mr. Davis conducted his inspection, and he guessed that someone had gone into the area but was careless after leaving the area and did not lock the gate when he left (Tr. 75).

Respondent's Testimony and Evidence

James Papenhausen, respondent's safety director, testified that company policy requires that a particular piece of equipment be deenergized or locked out at its power source before any guard is removed so as to eliminate the chance of an accidental startup. He confirmed that the respondent has disciplinary measures, including discharge, in place which are used in the

case of any employee violating company or federal policies regarding the removal of guards in areas where they may be working. He cited an example of an employee who was discharged for refusing to wear safety glasses (Tr. 78).

Mr. Papenhausen stated that prior to Mr. Flowers' inspection, the superintendent was instructed to lock the gate and the signs were put in place before that inspection. He confirmed that after that inspection, makeshift guards were installed to abate the citation, and approximately 3 days later after telephone conversations and an exchange of correspondence with Mr. Christensen, the guard was removed from the crusher belt drive after the respondent was advised that a gate would be acceptable to MSHA if the lock was removed and replaced with a bolt. He confirmed that this was done. He also confirmed that the respondent also installed bolts on similar gates which are used at all of its mine sites to avoid being continually cited for using padlocks. However, in addition to the bolts, the respondent also uses padlocks in keeping with its policy (Tr. 80). He confirmed that the signs are merely to remind employees that they are not allowed in the crusher areas in question (Tr. 81). Mr. Papenhausen pointed out, however, that the respondent operates mines in St. Louis, which are under the enforcement jurisdiction of another MSHA district, and in "exactly the same situation" as this case, and it uses padlocks rather than bolts. One mine has been in operation for 2 years, has had five or six MSHA inspections, and it has never been cited for using padlocks and the issue has never come up (Tr. 87-88).

Mr. Papenhausen stated that in no instance has the respondent ever guarded large plant areas with gates. The guards are always in close proximity to the crusher equipment and enclose a natural area immediately around the drive (Tr. 82). He made reference to MSHA's "guide for guarding" and pointed out that the respondent tries to take into consideration all of the guarding criteria in order to provide adequate guards (Tr. 82).

Findings and Conclusions

Fact of Violation

The respondent is charged with a violation of mandatory safety standard 56.14107, which provides as follows:

§ 56.14107 Moving machine parts.

(a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

(b) Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces.

The facts in this case reflect that Inspector Davis cited the respondent with a violation of section 56.14107, on June 21, 1989, after observing that the belt drive which powered the primary crusher was not guarded while the crusher was in operation. Although the drive was not physically guarded at the drive location, the respondent had a well constructed gate in place at the entranceway of the platform area where the drive was located. The respondent's policy required that the gate be kept locked with a padlock at all times while the crusher and drive were in operation, but at the time of the inspection, the gate was unlocked and opened, allowing anyone to freely enter the unguarded crusher drive area.

Inspector Davis established June 26, 1989, as the abatement date for the violation. Inspector Flowers went to the mine on August 14, 1989, for a follow-up inspection, and after finding that the previously cited drive was not guarded, and that "no action was taken to correct the violation," he issued a section 104(b) order for non-compliance. The respondent's credible and un rebutted testimony establishes that the gate was locked with a padlock, and that the key was in the possession of the crusher operator who was in his control booth which was elevated above the crusher platform and physically separated from the platform by the locked gate. The violation was abated and terminated after the respondent promptly fabricated and installed a guard over the crusher drive. Several days later, and after further contacts with an MSHA supervisory inspector, the respondent was advised that it could continue to use the gate as a guarding device for the drive as long as the gate was secured by a bolt, rather than a padlock, and that this would suffice as a means of compliance with the standard. The respondent installed a bolt on the gate, but removed the guard which had been installed over the drive, and also posted signs. The respondent also continued to use a padlock on the gate, in addition to the bolt.

The respondent takes the position that the use of substantial gates with padlocks, coupled with a lockout procedure to guard and prevent injuries at its crusher drives, the posting of warning signs forbidding access to these areas, and severe disciplinary action against employees who violate its policy in this regard, is the most efficient and effective means for preventing accidents. Respondent suggests that in these circumstances, the use of padlocked gates as a means of guarding its crusher drives complies with the requirements of section 56.14107. The respondent also asserted that the drive areas are in no-ones work area or even in the path of anyone who would be travelling to the area to work, and that the equipment is locked out for inspections and maintenance.

MSHA takes the position the cited crusher belt drive was not guarded at the time Inspector Davis conducted his inspection and issued the citation. Although the evidence in this case reflects that MSHA would accept a gate as compliance with the guarding requirements of section 56.14107, even though the particular equipment pinch point is not physically and individually guarded at its immediate location, MSHA's position is that the gate must be secured with a bolt and nut rather than a padlock.

In Yaple Creek Sand & Gravel, 11 FMSHRC 1471 (August 1989), Judge Morris found that a gate 4 to 5 feet from an unguarded chain drive assembly on a hopper feeder conveyor belt did not satisfy the guarding requirements of section 56.14001 (redesignated 56.14107). In Walker Stone Company, 12 FMSHRC 256 (February 1990), Judge Fauver found that a stop cord located over the unguarded portion of a conveyor belt tail pulley did not satisfy the guarding requirements of section 56.141001, and he observed that the standard does not provide for the use of a stop cord in lieu of guarding.

The evidence in this case establishes that the cited belt drive was not individually physically guarded at the time of the inspection, and the gate which served as guard was unlocked and opened, thereby allowing free access to the crusher belt drive area immediately inside the gate. The respondent has conceded that the cited belt drive was not guarded as required, and that the cited condition constituted a violation of section 56.141107. Under all of these circumstances, I conclude and find that a violation has been established, and the citation IS AFFIRMED.

In its pleadings (answer), filed in this case, the respondent asserted that the use of a guard large enough to cover the particular drive in question would create a hazard every time it were removed and replaced because it would weigh several hundred pounds and was extremely bulky, and would subject employees to pushing and pulling injuries. The respondent also maintained that requiring such a guard would make repairs extremely time consuming in requiring additional people and equipment to simply remove the guard, therefore greatly increasing their exposure to any number of additional hazards associated with lifting heavy bulky objects. Mr. Ellis, who designed the crusher operation, confirmed that someone could twist their back while lifting the guard, but he estimated that a good substantial guard would weigh fifty (50) pounds.

In justifying the use of a padlock, the respondent relied on MSHA's Guide to Equipment Guarding, and it included selected and highlighted portions of this publication as part of its answer, and made reference to it in the course of the hearing. The highlighted publication language reads as follows:

The installation and maintenance of machinery and machine guards are governing factors in controlling and preventing accidents and injuries. In devising protection against moving machinery and machine parts, the goal should be to make it as effective as possible. . . .

An effective machine guard should have certain characteristics in design and construction. Such a guard should:

1. Be considered a permanent part of the machine or equipment.
 2. Afford maximum positive protection.
 3. Prevent access to the danger zone during operation.
 4. Be convenient; it must not interfere with efficient operation.
 5. Be designed for the specific job and specific machine, with provisions made for oiling, inspecting, adjusting, and repairing machine parts.
 6. Be durable and constructed strongly enough to resist normal wear.
 7. Not present a hazard in itself.
- (Page 3).

It is recognized that a given situation--a hazard-creating motion or action--may frequently be guarded in a number of ways, several of which may be satisfactory. The selection of a guarding method to be used may depend upon a number of things--space limitations, production methods, size of stock, frequency of use, and still other factors may be important in making the final decision. Moving machine parts, nip points and pinch points must be guarded individually rather than restricting access to the areas by installing railings. It is not the intent of this guide to suggest which method of guarding is the best for a given situation, but rather to show that there are a number of ways to guard each different condition. This will be done by illustrating typical situations which may be guarded by a variety of methods. (Page 4).

Remote areas protected by location need not be guarded. However, if work is performed at such location as shown in figure 5, the equipment must be deenergized and locked out and a temporary safe means of access (ladder) provided before any work is started.
(Page 8).

MSHA's Program Policy Manual, Volume IV, pg. 55, July 1, 1988, contains no reference to the use of padlocked or bolted gates as a means of complying with the guarding requirements of former section 56.14001. However, the policy does state the following: "The use of chains to rail off walkways and travelways near moving machine parts, with or without the posting of warning signs in lieu of guards, is not in compliance with this standard."

Although the respondent's reliance on the information found in the aforementioned guarding guide may be considered in weighing the respondent's negligence and good faith compliance, I reject its reliance on this guide as an absolute defense to the violation. I have reviewed a complete copy of this publication, and I find absolutely no reference to the use of gates, padlocked or bolted, as an acceptable means of guarding or complying with the guarding standard in question. Indeed, some of the language found in this publication seemingly makes it clear that equipment and components thereof which present a hazard must be individually guarded by guards affixed to the particular piece of equipment rather than to the general area where the equipment may be located. See the last paragraph at page 3, which states ". . . it must be kept in mind that protective guards placed around the moving machinery should completely enclose the moving part and should be positioned so that the moving equipment or pinch point which presents a hazard cannot be reached." See also the fifth paragraph at page 4, which states "Moving machine parts, nip points and pinch points must be guarded individually rather than restricting access to the areas by installing railings." (Emphasis supplied).

I have some difficulty comprehending MSHA's theory that the use of a bolt and nut to secure a gate, as opposed to a padlock with a key, would make it more difficult for someone to gain access to a crusher area where an unguarded belt drive was located. It seems to me that the use of a padlock in a situation where there is only one available key which is in the possession of the crusher operator at all times, would limit access to the hazardous area to that one individual, and would preclude any unauthorized entry by anyone else. However, the use of a bolt and nut inserted through a hole drilled in the frame of the gate, would allow any number of people with an ordinary or household wrench, which I assume are readily available at rock quarries, to readily access the area if they are so inclined.

In commenting on the permissible use of padlocks to secure or lock out electrical boxes, Inspector Christensen distinguished the use of those locks from a padlock used to secure a gate on the ground that an electrical box is specifically designed to accommodate the use of a lock, and the individual locking out the box always has control of the key, thereby excluding anyone else from opening the box. Mr. Christensen stated that it would be illegal to use a bolt to secure an electrical box, even if the box were specifically manufactured to accommodate a bolt. He reasoned that anyone could remove the bolt at anytime, and the person who initially locked out the box with a bolt would have no control over anyone who may remove it. Quite frankly, I fail to see the logic in the rather contradictory distinctions made by Mr. Christensen in the two scenarios presented.

The introductory statement found on the first page of MSHA's guide to guarding reflects that the information found therein is intended to assist industry, labor, and MSHA inspectors in obtaining uniformity throughout the mining industry. On the facts of this case, and notwithstanding the total lack of any references to the use of bolted gates as an acceptable means of guarding equipment, MSHA has apparently, in one district, accepted the use of gates, as long as they are secured by a bolt and nut, rather than a padlock. In order to achieve clear and unambiguous uniformity, I would respectfully suggest that there is need for MSHA to clarify and amend its policy and guide so as to insure even-handed enforcement among its various enforcement districts. Further, if MSHA believes that the use of a bolted gate is a recognized and acceptable means of guarding an equipment area, it should consider adopting and incorporating compliance criteria as part of its Part 56 regulations so that mine operators who are subject to civil penalty sanctions are fairly and uniformly put on notice of what is required of them for compliance. The disclosure of information clarifying the regulation will serve the goal of enforcement by encouraging knowledgeable and voluntary compliance with the law. See my comments in Massey Sand and Rock Company, 1 FMSHRC 545, 554-555 (June 18, 1979), Commission review denied, 1 FMSHRC (July 1979).

Although the respondent has not specifically raised an estoppel defense in this case, Mr. Papenhausen alluded to the fact that another MSHA enforcement district has not cited the respondent for securing gates used to guard equipment with padlocks rather than bolts. Although I believe that MSHA should be consistent in the interpretation and application of any mandatory standard, the fact that one district has opted not to cite the respondent under circumstances similar or identical to those presented in this case, may not serve as a defense to the violation issued in this case. See: Ferndale Ready Mix & Gravel, 6 FMSHRC 2154 (September 1984), and the cases cited at 6 FMSHRC 2159; J & R Coal Company, 3 FMSHRC 591 (1981); Burgess Mining and

Construction Corporation, 3 FMSHRC 296 (1981); Price River Coal Company, 5 FMSHRC 1734 (1983).

The respondent's suggestion that the cited crusher drive was guarded by location is likewise rejected. I find no credible evidence to support any such conclusion. Although the location of the drive may be relevant to the question of gravity or negligence, it may not serve as a defense to the violation. The cited standard requires the guarding of moving machine parts that can cause injury. The evidence in this case clearly establishes that contact with a moving crusher drive would result in serious injuries. Although MSHA has not rebutted the respondent's credible testimony that the crusher is locked out before any maintenance work is performed in the area, and no one is usually in the area when the crusher is in operation, Mr. Ellis did not dispute the fact that the gate was open and unlocked when Inspector Davis conducted his inspection, and Mr. Ellis surmised that someone had entered the area but was careless after leaving and failed to lock the gate when he left. Inspector Davis testified that Mr. McGee told him that someone had probably done some work in the area greasing, oiling, or checking the crusher, but failed to lock the gate (Tr. 15).

Inspector Flowers, an inspector with 12 years of experience, including the inspection and observation of operating crushers, testified credibly that a supervisor generally will observe an operating crusher on a daily basis during each shift to ascertain that it is operating properly, and that if he were to walk into the area he would be exposed to a hazard if a belt drive were not guarded. Mr. Ellis conceded that if anyone opened the gate and walked into the area, he could get hurt if he contacted the unguarded drive (Tr. 64).

Although Inspector Davis failed to develop any evidence as to who may have been in the crusher area when he found the gate unlocked, and failed to ascertain whether any maintenance men or other personnel were in the area immediately prior to his inspection, Mr. Ellis confirmed that a supervisor or foreman is expected to make complete inspections of the plant each day, including a walkaround of the crusher area. Mr. Ellis also confirmed that the crusher platform area was specifically designed to provide walking clearances around the crusher equipment, and was provided with a designated walkway to provide ready access to the equipment. He conceded that anyone walking around in that area while the crusher was in operation would be exposed to the dangerous pinch points. Although Mr. Ellis believed that it would be stupid for anyone to be in the area with the crusher running, I believe that it could very well be that this "stupid" individual was the same "careless" individual who went into the area and left without locking the gate. Mr. Ellis conceded that Inspector Davis acted properly in citing a violation, and that

the respondent violated the cited standard by leaving the gate unlocked (Tr. 31, 42).

Although the respondent has achieved compliance in this case by installing a bolt in the gate used to guard its crusher belt drive, it has gone one step further and continues to use a padlock as an additional means of securing the gate, and has posted warning signs on the gate. The belt drive itself continues to remain individually unguarded. It seems obvious to me from the record in this case that the respondent is not too enchanted with MSHA's view that a gate may be used, as long as it is bolted, but that padlocks are unacceptable. Under the circumstances, the respondent may wish to consider initiating a modification proceeding pursuant to section 101(c) of the Act, seeking a variance to continue its use of padlocks as a means of achieving compliance with section 56.14107.

History of Prior Violations

The parties stipulated that the respondent was issued four violations during the preceding 24-month period ending on October 16, 1989. The petitioner offered no further evidence with respect to the respondent's compliance record, and there is no evidence of any prior guarding citations. Under the circumstances, I conclude and find that the respondent has a good compliance record, and I have taken this into consideration in this case.

Size of Business and Effect of Civil Penalty Assessment on the Respondent's Ability to Continue in Business

The record reflects that the respondent operates a limestone mining and crushing operation, and that it has nine employees at its Valley Plant No. 7, including a superintendent and a scale person (Tr. 76). I conclude and find that the respondent is a small operator. The parties stipulated that the payment of the proposed civil penalty assessment will not adversely affect the respondent's ability to continue in business.

Gravity

Inspector Davis' non-S&S finding was based on his conclusion that it was unlikely that anyone could have been injured at the time of the inspection because he observed no one in the crusher area other than the crusher operator who was in his control booth. Although it is true that anyone contacting the belt drive could be injured, the respondent's un rebutted evidence establishes that the crusher is deenergized and locked out when any work is performed in the area, that the gate leading to the crusher drive area is normally locked in accordance with company policy, and the key is normally kept in the operator's possession.

Although the petitioner suggested that a supervisor or foreman may venture into the platform drive area where the crusher was located, Inspector Davis made no inquiries in this regard and developed no evidence to establish the likelihood of anyone being inside the gate area while the crusher was in operation. Further, I find no credible evidence to establish that anyone going and coming from the operator's crusher control booth by means of a ladder shown in the photographic exhibits would likely be inside the platform area where the crusher drive was located. Under all of these circumstances, I conclude and find that the violation was non-serious.

Negligence

Inspector Davis confirmed that he based his moderate negligence finding on the fact that with the exception of the gate which was used as a means of guarding the crusher belt drive, the respondent had guards installed over all of its remaining moving equipment at the pinch points. Although the respondent relied on MSHA's guarding guidelines in concluding that it could use a padlocked gate as a guarding device, as noted earlier, the guidelines made no mention of the use of padlocks, and they indicate that exposed moving equipment pinch points should be physically guarded individually. However, I believe that the respondent's negligence is mitigated by the fact that MSHA has accepted a bolted gate as a suitable guard, and I conclude and find that it was not totally unreasonable for the respondent to believe that padlocking the gate with a key which is normally kept in the possession of the crusher operation was sufficient compliance with the cited standard. However, since the gate was unlocked and open at the time of the inspection, I conclude and find that the respondent knew or should have known that the belt drive was unguarded. Under all of these circumstances, I conclude and find that the respondent's failure to exercise reasonable care to insure that the belt drive was guarded while the crusher was in operation constitutes ordinary negligence.

Good Faith Compliance

Inspector Davis confirmed that he fixed the abatement time of June 26, 1989. However, no testimony was forthcoming from the inspector with respect to whether he specifically made it clear to Mr. McGee that the use of a padlocked gate was unacceptable. Inspector Flowers testified that at the time he issued the order the pending office file contained no inspection field notes incident to Mr. Davis' prior inspection, and he simply relied on a copy of the citation which reflected that the drive motor was not guarded. Mr. Flowers confirmed that Mr. McGee told him that he was instructed not to guard the belt drive and to simply post warning signs on the gate, and Mr. Flowers confirmed that the signs were in fact posted. .

Mr. Ellis testified that after the citation was issued, Mr. McGee was instructed to insure that the gate was kept locked at all times in accordance with company policy. Mr. Ellis was unsure as to when Inspector Davis may have informed management that a lock on the gate would not suffice as compliance with the cited standard. Mr. Ellis explained that in his view, the failure to lock the gate at the time Mr. Davis conducted his inspection was "just like leaving the guard off" and he believed that compliance was achieved at the time Mr. Flowers inspected the site and issued the order because the gate was locked and signs were added to emphasize the point to anybody who might go into the area (Tr. 71). He also explained that when the respondent was told that a bolt would be better than a lock, it made no sense to him because he believed that better control could be achieved by the use of a lock rather than a bolt (Tr. 72). Mr. Ellis also considered the fact that various types of equipment are guarded by devices which are hinged and secured by twist locks provided by the manufacturers (Tr. 73).

The section 104(b) order issued by Inspector Flowers is not directly in issue in this case and there is no evidence or information of record as to whether or not the respondent filed any separate contest of that order within the required time period. However, the order is relevant to the proposed civil penalty assessment made by MSHA in this case since it seems obvious that MSHA took the order into consideration as part of its proposed civil penalty assessment, particularly with respect to the question of negligence and good faith compliance.

The evidence in this case establishes that the respondent abated the order within 40 minutes of its issuance and promptly installed a guard at the cited belt device. Within a few days, the respondent was allowed to remove the guard, and in lieu of an individual guard, was permitted to continue to use the then bolted gate as a means of guarding the belt drive. In addition to the bolted gate, the respondent continued to keep the gate padlocked and posted with warning signs.

Having viewed Mr. Ellis during the course of the hearing, he impressed me as a credible and responsible safety-conscious individual. On the facts of this case, and taking into account the aforementioned mitigating circumstances under which the respondent continued to use a padlocked gate as a means of guarding the cited belt drive, I conclude and find that the respondent ultimately achieved good faith compliance in correcting the cited condition.

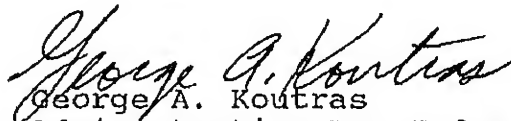
Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found

in section 110(i) of the Act, I conclude and find that a civil penalty assessment of \$50 is reasonable and appropriate for the contested section 104(a) citation which I have affirmed in this case.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment of \$50 for section 104(a) Citation No. 3258150, June 21, 1989, 30 C.F.R. § 56.14107. Payment is to be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed.


George A. Koutras
Administrative Law Judge

Distribution:

Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn Street, 8th Floor, Chicago, IL 60604
(Certified Mail)

Oscar W. Ellis, President, James R. Papenhausen, Safety Director, Moline Consumers Company, 1701 Fifth Avenue, Moline, IL 61265
(Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 18 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 90-36-M
Petitioner	:	A.C. No. 04-04684-05505
v.	:	
	:	Peters Trucking Plant
PETERS TRUCKING COMPANY,	:	
Respondent	:	

DECISION

Appearances: George B. O'Haver, Esq., Office of the Solicitor,
U.S. Department of Labor, San Francisco,
California, for the Petitioner;
Leo M. Cook, Esq., Ukiah, California, for the
Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments in the amount of \$1,834 for ten (10) alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The respondent filed a timely answer and a hearing was held in Ukiah, California. The parties waived the filing of posthearing briefs, but I have considered their oral arguments made on the record during the course of the hearing in my adjudication of this matter.

Issues

The issues presented in this case are (1) whether the conditions or practices cited by the inspector in the contested citations constitute violations of the cited mandatory safety standards, and (2) the appropriate civil penalties to be assessed

for the violations, taking into account the statutory civil penalty assessment criteria found in section 110(i) of the Act, and any mitigating circumstances connected with the violations. Additional issues raised by the parties are disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Petitioner's Testimony and Evidence

MSHA Inspector Michael E. Turner testified that he conducted his initial inspection of the respondent's mine site on September 13, 1988, and he confirmed that the crusher plant was shutdown at this time and that "several employees were in the process of building guards" (Tr. 8). He confirmed that he considered the citations to be "non-S&S" because he observed no exposures to any hazards because the plant was down and he observed no employees walking about the plant while it was in operation.

With regard to Citation No. 3285843, concerning the lack of guarding for the jaw crusher tail pulley and mechanical belt, Mr. Turner stated that he fixed the abatement time of September 20, 1988, after discussing it with Mr. Peters, and that Mr. Peters gave him that date as the time within which he could make the changes and corrections required. Mr. Turner further stated that when he returned for a follow-up compliance inspection on May 31, 1989, he found that "no apparent effort had been made to correct the condition that was previously cited" on September 13, 1988, and the crusher appeared to be in the same condition. When asked whether he spoke to Mr. Peters on May 31, Mr. Turner replied as follows:

A. I am sure I did. The thing of it is, Mr. Peters quite often is not there and I spoke with Mr. Bagley so I can't really say that I talked to Mr. Peters that day. If I issued a 104-B order I would think that I talked to Mr. Peters. I would assume that I did.

Q. All right.

THE COURT: Did you take any notes or anything that day that would refresh your recollection?

THE WITNESS: I did. But the conference sheet that we fill out states that I did talk to Mr. Peters about all the changes to orders, 104-B orders.

Mr. Turner stated that he next returned to the site on June 9, 1989, when he terminated the citation and order, and he indicated that the original citation abatement date had been extended and that he would have discussed the abatement dates with Mr. Peters during his subsequent two visits (Tr. 11).

Notwithstanding his belief that "no apparent effort had been made" to secure the guard for the crusher tail pulley and belt on May 31, 1989, he agreed that a guard had been provided for the crusher flywheel on that day, but it simply lacked a bottom piece which was missing, and that some work had been performed to abate this condition (Tr. 15).

With regard to Citation No. 3285844, concerning the jaw crusher drive motor, Mr. Turner stated that although three violative conditions are noted on the citation form, he only issued one violation in accordance with MSHA's policy. He believed that there was a problem with the motor feed box because it was an old motor and a box had to be fabricated (Tr. 13).

With regard to Citation No. 3285845, concerning the lack of a protective railing or barrier to "prevent the fall of person" at the walkway adjacent to the jaw crusher control station, he believed that no barriers were present when he returned on May 31. With regard to the notation on his order issued that day that "no apparent effort had been made to correct the condition of a chain used to prevent contact with moving machine parts at the jaw crusher control station," Mr. Turner stated that the chain was at a different location than the missing barrier or railing and that the chain was simply hanging down from a support post. The missing barriers concerned the other side of the control station (Tr. 18).

With respect to Citation No. 3285846, concerning the lack of guards on the tail pulley pinch points on a conveyor under and below the crusher, and his notation on May 31, that "no apparent effort had been made to secure" the guards, Mr. Turner believed that there may have been a change in the condition as it was initially cited on September 13, but that he could not specifically recall this condition and had no independent memory of the cited guard condition (Tr. 21).

With regard to Citation Nos. 3285848, 3285849, and 3285850, Mr. Turner stated that he recalled these cited guarding conditions, and that no changes had been made during the intervening

period of September 13, 1988, and May 31, 1989, when he issued the orders, and that the conditions were the same (Tr. 21-24). He confirmed that the upper conveyor tail pulley (Citation No. 3285850) was guarded, but that the guard was inadequate, and abatement was achieved by pulling the guard screen together and either bolting it or wiring it to eliminate the possibility of someone reaching in and contacting the pinch point (Tr. 24).

On cross-examination, Mr. Turner confirmed that when he initially visited the site on September 13, there were two crushers at the site, and that all of the citations were issued on the new crusher that Mr. Peters was working on in order to make it operational. Mr. Turner stated that the crusher had been operating when he arrived at the site, but that it was shutdown during the inspection. The other crusher was not wired up and was down (Tr. 25-26). He confirmed that Mr. Peters informed him that the crusher which was cited was newly purchased and that he was attempting to set it up (Tr. 27). When asked to confirm whether he informed Mr. Peters that the cited conditions had to be corrected before the crusher was placed in production, Mr. Turner responded as follows (Tr. 28-29):

A. If we have a problem with semantics, I believe what I told Mr. Peters, which I tell many of the operators, almost all of the operators, is if there is a violation present that the plant should not be operating until that violation is taken care of.

Q. Right, Now did you also tell him that as long as he had these items covered by your citations repaired or installed that he could then place the plant into operation?

A. If they are non S and S citations he can repair them and go from there.

Q. Would it be fair to state that Mr. Peters could very well have understood that there was no particular time limit on making these repairs or installations, provided that he wasn't using the plant?

A. I find it difficult after all of the conversation that we have had, discussions that he could not be aware of the termination dates.

Q. Okay. Now your second visit was on February 23, 1989, and from looking at the various documents it appears that you arrived there at 12 minutes after 12:00 -- 14:07. That would be 2:07 in the afternoon?

Q. (BY MR. COOK) Now as I read from your citation of that date, it is the second page under 3285841. You state in the last paragraph, "the plant has been down for some time and Mr. Peters had assured the inspector that the violations shall be remedied prior to start up in the future." That is exactly what he said?

A. Yes, sir.

Mr. Turner stated that all of the cited conditions were ultimately corrected to achieve compliance, and although he had no evidence to establish that the plant was operated without the corrections being made, he confirmed that when he first drove up to the site on September 13, he observed that the plant was running. However, he took "a break" waiting for Mr. Peters to arrive to accompany him on his inspection, and when he returned the plant was shutdown. Mr. Turner described the equipment which comprised the crushing "plant," and he confirmed that all of the guarding citations involved the Eagle jaw crusher operation. He stated that material was being processed through the crusher when he initially observed it in operation, and he confirmed that he did not inspect the second crusher which was not wired up (Tr. 31-33).

With regard to his subsequent visit to the site on February 23, 1989, Mr. Turner confirmed that it was a follow-up visit to abate the citations which he issued on September 13, 1988. Although the extension notice issued that day for Citation Nos. 3285841 and 3285855, were the only ones included with the pleadings filed by MSHA, and were the only ones of record at this point in the hearing, Mr. Turner believed that he issued other extensions that day. When asked if he had any independent recollection that he in fact extended the other citations, he replied "the procedure would be to extend them. . . . I would have to look it up and try to find records in regard to that" (Tr. 38). When asked for an explanation as to why he would issue a section 104(b) order 5 months after he extended the abatement time for a citation, Mr. Turner responded as follows (Tr. 38-39):

THE WITNESS: Well, first of all, I would like to talk to the operator to find out whatever mitigating circumstances he may have had for not operating the plant.

THE COURT: Do you recall any in this case? What may have happened?

THE WITNESS: I remember going out there, but I cannot remember the conversation on February 23rd, and I cannot remember whether I spoke to Mr. Bagley or Mr. Peters or both of them.

THE COURT: You don't recall whether you issued any extension on all of these other citations that we just went through regarding this?

THE WITNESS: I can't recall. The correct procedure would be for me to do that, but I can't recall whether I did or not.

MR. O'HAVER: I think had he done that they would have been part of the record. They are not.

THE COURT: Doesn't it strike you kind of strange that he would go out there and issue them on the 13th and go back on the 23rd and only address two and not the others?

MR. O'HAVER: It could very well be that time of the year everything was down and he may have only met with Mr. -- Mr. Peters may not have been there, maybe only one person there, and they only talked about the record keeping portions. That time of the year the plant wouldn't ordinarily be operating.

THE COURT: So then he goes back on the 31st?

MR. O'HAVER: Yes, because the weather's getting better and they are going to start operation. That's just speculation on my part.

With regard to Citation No. 3461132, which he issued on June 1, 1989, Mr. Turner testified that he observed a truck driver driving a "cat" front-end loader without a hard hat on. He confirmed that the loader was equipped with rollover protection (ROPS), but that the canopy was not completely enclosed and was open at the top, and had no windshield or side protection. Except for the rollover bars, the loader operator was completely exposed. Mr. Turner stated that the driver was an employee of the respondent, and he identified him as "Mr. Morgan." He stated that the driver was loading the truck with rocks from the side with the bucket of the loader in a raised position, and that he was exposed to a hazard of a "spill of rocks coming back and hitting him in the head." He further believed that the failure by the driver to wear a hard hat could have resulted in a serious injury if he were struck by a rock and he would have incurred "lost days or restricted duty." Mr. Turner confirmed that he observed that rocks were spilling off the raised bucket, and he found that an injury was reasonably likely to occur (Tr. 42). Mr. Turner described the loader as "pretty small," and he stated that the loading bucket would be approximately 8 to 10 feet ahead of the operator's compartment, and if the load were lifted and tilted into the bed of the truck which was being loaded, the load

would be 8 to 10 feet high and over the position of the operator at the controls of the loader (Tr. 45).

Mr. Turner stated that he based his "high negligence" finding on the fact that he and Mr. Peters had discussed the matter of wearing hard hats on the property, and although he believed that the respondent's employees had hard hats available, he did not know whether Mr. Peters furnished them. He could not recall where the hard hat used to abate the citation came from, or whether it was in the loader, in the truck, or obtained from the shop (Tr. 43). He confirmed that he has previously observed loader operators loading materials on a truck and that they wore their hard hats while in the loader (Tr. 44). He further confirmed that the violation was abated in 3 minutes by providing a hard hat, but he could not recall where Mr. Peters obtained it (Tr. 45).

Respondent's Testimony and Evidence

Mr. Robert Peters, a partner in the operation, testified on behalf of the respondent. Mr. Peters testified that the loader which was being operated, as well as his other loaders, are equipped with ROPS protection, and although the front and sides of the machine were open, the top was enclosed with a quarter-inch steel plate. He stated that the driver was furnished with a hard hat but that he had it in the truck and he had not bothered to put it on. He confirmed that drivers may load the trucks themselves, or a loader operator will load them (Tr. 46-47; 53).

Mr. Peters testified that he purchased the Eagle crusher in question at an auction in Oregon, and brought it to his operation in Willits, California. Since he had not previously observed it in operation, the crusher was in a "set-up mode" at the time of the initial inspection by the inspector on September 13, 1988. He confirmed that the crusher was not in production at that time, and that "we were trying to see if it worked and what needed to be done to put it into production" (Tr. 48). He further confirmed that a second crusher unit, which had previously been in operation at another location, had been moved "from the North plant in town" and was located next to the Eagle crusher in the vicinity of the power source.

Mr. Peters testified that on September 13, 1988, he and the inspector went to the Eagle crusher plant, and he advised the inspector that he had just purchased the crusher. Although the inspector understood this, he inspected the crusher and issued several citations and explained what needed to be done to bring it into compliance. At the completion of the inspection, the inspector "stated to me that, you now, as long as we didn't run the plant until we had all these corrections made there was no problem" (Tr. 48). Mr. Peters explained that the crushers are not used during the winter because no crushing is done, and it

was his understanding that the inspector was giving him "all winter to get everything put on it and get it up to par" (Tr. 49).

Mr. Peters stated that the inspector next returned on February 23, 1989, to follow up on a citation issued on September 13, 1988, for failing to conduct an annual test for continuity and resistance of the grounding system. Mr. Peters stated that during this visit several equipment guards which he had made were laying by the machine, and that the inspector informed him that "there was no problem with the guards," and that as long as all of the guarding citations were corrected before he went into production, "that there was no problem" (Tr. 49).

Mr. Peters confirmed that the inspector next returned to the site on May 31, 1989. Mr. Peters stated that he informed the inspector that he could not accompany him on his inspection because he was occupied with a mechanical problem on one of his trucks and asked him to come back in an hour. The inspector replied "no" and proceeded to write up the section 104(b) orders. Mr. Peters stated that although he was unhappy with the inspector issuing these orders because he previously told him that there would be no problem as long as he had made the repairs before the crusher was put in operation, he nevertheless continued to complete the repairs and install the guards. He indicated that most of the guards had been constructed and some were installed. He alluded to one particular guard to cover the crusher flywheel, and confirmed that when the inspector returned a week or 9 days later, "we had everything completed and he signed them off" (Tr. 51).

Mr. Peters further stated that if he had not been occupied repairing the truck on May 31, 1989, and had been able to accompany the inspector on his inspection, he would have tried to convince him that he did in fact make an effort to comply and would have reminded him of his understanding in February that the violations had to be abated before he placed the crusher into production. Mr. Peters stated further that he had made "lots of effort to correct the problem," that most of the guards were there, but not on the crusher, and that the inspector saw them (Tr. 51). Mr. Peters stated that he had no opportunity to explain to the inspector because "I was busy repairing my truck while he was writing the 104-b's" (Tr. 52).

On cross-examination, Mr. Peters stated that he often talks to his employees about safety hazards, emphasizes hard hats, and that he has a good insurance company safety record rating. He explained that in connection with the crusher "set up" on September 13, 1988, it had been run two or three times prior to that day with "a little material" in order to check the system to

determine if any repairs were needed (Tr. 55). When the inspector returned on February 23, they discussed the fact that the crusher could not be operated until all of the needed corrections previously cited on September 13, were made, and the inspector did not speak to him about any specific dates. Mr. Peters stated that he did not look at the "paperwork" or the extension dates left with him on February 23, and did not discuss this with the inspector, but did assure the inspector that before he put the crusher into production, the corrections would be made (Tr. 56).

Mr. Peters stated that he usually reopens his operation in June after the winter season because he cannot have access to any streams to obtain his materials until after May 15, when his state fish and game permit is issued. The state usually permits him access to the streams in June. He confirmed that when the inspector returned on May 31, the crusher plant was still dormant and not in production and had not been running (Tr. 56).

With regard to the initial inspection citations issued on September 13, Mr. Peters testified that he did not discuss the September 20, abatement dates recorded on the citations with the inspector, and that these dates do not mean anything to him. He explained that he "glanced over" the citations and read what the inspector wrote and knew that he was writing because "we went over each item specifically and he told me what needed to be done to comply" (Tr. 57).

Inspector Turner was called in rebuttal by the petitioner, and he produced and reviewed copies of several extension notices he issued on February 23, 1989, extending the abatement times of the citations he issued on September 13, 1988, to February 27, 1989 (exhibit P-2, Tr. 58). Mr. Turner stated that he had no independent recollection of discussing the termination dates with Mr. Peters, but that his extensions would indicate to him that they were discussed (Tr. 59).

As noted earlier, the violation extension notices issued by Inspector Turner on February 23, 1989, were not included as part of the initial civil penalty assessment proposal pleadings filed by the petitioner in this case, and petitioner's counsel could offer no explanation as to why they were not previously filed with the pleadings (Tr. 59). The inspector retrieved his file copies during a break in the hearing prior to being called in rebuttal, and the respondent's counsel confirmed that he had not previously seen them. Although the copies reflect that they were served on him, Mr. Peters stated that he had not previously seen them (Tr. 60).

I take note of the fact that copies of the extension notices produced by Inspector Turner at the hearing are stapled to an Inspection Information Sheet filled out by Mr. Turner. In the

"Remarks" portion of that document, Mr. Turner notes that "Copies of terminations and extensions given to office personnel" (Exhibit P-2, pg. 1). Mr. Peters testified that they may have been left with a Mr. Dan Bagley (Tr. 60). Inspector Turner confirmed that he has been instructed not to leave mine property "until we issue the paperwork to someone, or that a copy stays on the property" (Tr. 61). Although the extensions reflect that they were served on Mr. Peters, Mr. Turner could not recall giving them to him, and he testified that "I may have addressed that to Mr. Peters and gave the copies to Mr. Bagley, the weigh master" or left them in the office. Mr. Turner could not recall any conversations with Mr. Peters on February 23, and stated that he made no inspection notes that day and could not find any (Tr. 62).

In response to further questions, Mr. Turner confirmed that Mr. Peters was having a problem with one of his trucks while he was at the site on May 31, 1989, and could not accompany him on his inspection that day. Mr. Turner stated that when he found that the original citations had not been abated or terminated, he made some notes and advised Mr. Peters that he would have to reissue them pursuant to section 104(b). He then wrote them up and discussed them with Mr. Peters. When asked about the nature of the conversation, Mr. Turner stated "we discussed them (sic) about the plant will not operate until all the violations are secured or remedied, and I left the property" (Tr. 64). Mr. Turner confirmed that he was not sure at that time whether or not the crusher had been in operation (Tr. 64).

Mr. Turner assumed that the plant was not in operation from September 13, 1988, through February 23, 1989, and he had no reason to dispute Mr. Peters' testimony that the plant is not normally put into production until after May 31 or early June. He also had no reason to dispute Mr. Peters' testimony that the cited crusher was being "set-up" and tested prior to any production, and that when he conducted the inspection the plant was not running and he did see anyone there (Tr. 65).

Although Mr. Turner claimed that he asked Mr. Peters on September 13, if a week was sufficient time to correct the violations, he agreed that it was possible that Mr. Peters was under the impression that he may have had a week to fabricate the equipment guards, but could wait until the plant was in production before installing them, notwithstanding the termination dates shown on the face of the citations (Tr. 67). Mr. Turner confirmed that the September 13, 1988, inspection was his first inspection of the crusher plant in question (Tr. 68). However, he believed that the plant has had other crushers which had been previously operated, and that other MSHA regular and follow-up inspections have been conducted at the site (Tr. 72). Since Mr. Peters advised him on September 13, that some material had been run through the crusher during the set-up, Mr. Turner

believed that it should have been in compliance with the guarding requirements because accidents may occur when the equipment is running and he found no excuse for not guarding it (Tr. 71).

Mr. Peters testified that during the initial set-up period, the crusher was not operated continuously for 3 days, and that it was operated for 10 minutes while adjusting a belt or changing a bearing, and the guard is off because it covers the tail pulley adjustment device and the guard must be off to make any adjustment. He stated that "we were not continually running for 3 days straight. We would fire up, run it, see a problem and then we would shutdown and work on that," and he reconfirmed that the crusher was not in a production mode from September 13, 1988, until the time the citations were ultimately abated (Tr. 76).

Findings and Conclusions

Jurisdiction

Although the respondent has not raised any jurisdictional question, the evidence establishes that the cited crusher was purchased out of state, and that the respondent has an MSHA ID number, and its crushed stone operation has been inspected and regulated by MSHA. I conclude and find that the respondent is a mine operator within the meaning of the Act, and is subject to MSHA's enforcement jurisdiction. See: Tide Creek Rock Products, 4 FMSHRC 2241 (December 1982); Southway Construction Co., 6 FMSHRC 174 (January 1984); Rockite Gravel Co., 2 FMSHRC 2543 (December 1980), Commission Review Denied, January 13, 1981; Mellott Trucking Company, 10 FMSHRC 409 (March 1988).

Fact of Violations

The respondent was cited for 10 violations of several mandatory safety standard found in Part 56, Title 30, Code of Federal Regulations. One violation was issued because of the failure to conduct a grounding system continuity and resistance test as required by section 56.12028; three were issued for failure to comply with the equipment guarding requirements of section 56.14001; two were issued for failure to guard a conveyor pursuant to section 56.14003; one was issued for the lack of equipment bushings or fittings as required by section 56.12008; one was issued for failure to provide a railing or barrier at the crusher travelway location pursuant to section 56.11012; one was issued for failing to conduct monthly inspections of fire extinguishers or to have the inspection records available at the work site as required by section 56.4201(b); and one was issued for a violation of section 56.115002, because of the failure of a truck driver to wear a hard hat while loading a truck with a front-end loader.

The respondent agreed and stipulated that the cited conditions and practices which are described by the inspector on the face of each of the contested section 104(a) citation notices which were issued on September 13, 1988, and June 1, 1989, were true, and that these cited conditions constituted violations of the cited mandatory safety standards (Tr. 5). Respondent further stipulated and agreed that it does not contest the two "single penalty" citations which resulted in proposed penalty assessments of \$20 (Citation Nos. 3285841 and 3285855) (Tr. 39-40).

The respondent further stipulated and agreed that its dispute in this case lies in its disagreement with the inspector's assertion that it made "no apparent effort" to remedy some of the cited conditions and abate the violations. These findings by the inspector formed the basis for his issuance of seven section 104(b) orders which resulted in proposed civil penalty assessments which the respondent believes are "high" and unwarranted for the conditions which were initially cited by the inspector on September 13, 1988.

In view of the foregoing, I conclude and find that all of the conditions and practices cited by the inspector in support of the citations which he issued on September 13, 1988, and June 1, 1989, constitute violations of each of the cited mandatory safety standards relied on by the inspector, and the violations ARE AFFIRMED.

History of Prior Violations

The respondent's history of prior violations is reflected in a "Proposed Assessment Data Sheet" submitted by the petitioner (exhibit P-1). The information presented reflects that with the exception of timely paid "single penalty" assessments, the respondent was assessed for six violations issued during the years 1986-1989. I cannot conclude that the respondent's compliance record is such as to warrant any additional increases in the civil penalty assessments which I have made for the violations in question in this case.

Size of Business and Effect of Civil Penalty Assessments on the Respondent's Ability to Continue in Business

The record reflects that the respondent operates a portable stone aggregate crushing operation employing approximately six individuals at any given time. Its annual production is approximately 30,000 tons of crushed stone materials (Tr. 5). Mr. Peters testified that two of his employees operate the crusher, and four employees serve as truck drivers or mechanics (Tr. 51). He also indicated that he is in production approximately 6 months out of the year (Tr. 80). Except for periodic equipment set-ups and testing periods, the record reflects that the crushing operation is essentially a seasonal business which

is not in production during the "winter season" from approximately mid-September through May or early June. I conclude and find that the respondent is a small operator and I have taken this into consideration in making the civil penalty assessments for the violations in question.

Mr. Peters testified that although payment of the full amount of MSHA's proposed civil penalty assessments for the violations may "hurt a lot. Particularly this year," he confirmed that payment of those penalties, in the amounts proposed by MSHA, will not put him out of business (Tr. 79). Under the circumstances, and in the absence of any evidence to the contrary, I conclude and find that payment of the civil penalty assessments which I have made for the violations which have been affirmed will not adversely affect the respondent's ability to continue in business.

Gravity

With the exception of the "hard hat" citation issued on June 1, 1989, all of the citations issued by the inspector on September 13, 1988, were issued as section 104(a) non-S&S citations. I take note of the fact that in each instance, the inspector noted "zero" as the number of persons affected by the cited violative conditions (Gravity Item 10-D). He also found that there was either "no likelihood" of any injury, or that an injury was "unlikely," but nonetheless found that the injury would be "fatal," "permanently disabling," or would result in "lost workdays or restricted duty." In connection with the six guarding citations, he noted on the face of the citation that the hazard "exposure could not be determined." Mr. Peters testified that if a hazard were presented, the only person exposed would be the crusher operator (Tr. 51).

When asked to reconcile his apparent inconsistent gravity findings, Mr. Turner explained that his findings of "unlikely" were based on the fact that the crusher plant was not in operation at the time of the inspection. However, if someone were to contact an unguarded pinch point, particularly a tail pulley, "it would be fatal" and "a person could get his hand in there or something and it could tear his hand or arm off and he could bleed to death" (Tr. 35). His findings of "fatal" would be relevant if the crusher were to be put into production (Tr. 36). With regard to his findings that "zero" persons would be exposed to any injury, Mr. Turner stated that "I believe this is the way OSHA" would consider any hazard exposure. He conceded that he may have been in error in making these findings, and that MSHA's current policy is to consider the total number of people working at the plant. He also conceded that any determination as to the actual number of persons exposed to any hazard "would have to be determined by asking Mr. Peters some questions. Who lubricated the plant and cleaned it out," and that these determinations

would have to be made before he checked the appropriate item boxes on the citation form (Tr. 36). In the instant case, Mr. Turner confirmed that all of the cited equipment which lacked guards was guarded before the crusher plant was placed in production (Tr. 37).

I conclude and find that Citation Nos. 3285841 and 3285855, for the failure to conduct the annual continuity and resistance grounding system tests, and the failure to inspect the fire extinguishers on a monthly basis were not non-serious violations. I find no evidence to support any conclusions to the contrary. Likewise, in the absence of any evidence or testimony to the contrary, I also find that Citation No. 3285844, for a lack of fittings and bushings on the cited components of the crusher was a non-serious violation. Under the circumstances, the inspector's non-S&S findings regarding these violations are affirmed.

With regard to Citation No. 3285845, for failing to provide a railing or a barrier at the travelway location adjacent to the jaw crusher operator's control station, I conclude and find that this was a serious violation. Although the crusher was not in operation at the time of the inspection, and the respondent had a chain available at one of the locations near the crusher, it was not hooked up to prevent anyone from walking through and into the crusher. Further, the inspector's unrebutted testimony establishes that the lack of a barrier or a railing at the cited travelway location presented a falling hazard and that a barrier or railing would prevent someone from falling off the control station area. The inspector also testified that when he and Mr. Peters walked up a stairway in the proximity of this unprotected area, the crusher jaw was open "where a person could step off into the jaw" (Tr. 17-19).

With regard to the five guarding citations (Nos. 3285843, 3285846, 3285848, 3285849, and 3285850), I conclude and find that they were all serious violations. Although the crusher was not in operation at the time of the inspection, the inspector's unrebutted testimony reflects that it was running when he initially drove up to the site, and Mr. Peters admitted that it had been in operation while it was being setup and tested. Further, the guards were not in place, and there is no evidence that they may have been installed while the crusher was being setup and tested. Under the circumstances, I conclude and find that there was some degree of hazard presented, and that a potential for an accident was present while materials were being run through the crusher while it was in a setup mode and being tested. The fact that the inspector found the violative conditions to be non-S&S is immaterial to any gravity finding or the seriousness of the potential hazards presented.

Neither the inspector or the petitioner suggested that the inspector's non-S&S findings with respect to the guarding citations should be modified. Although I am troubled somewhat by the inspector's inconsistent and contradictory findings with respect to the likelihood of any injuries, and his admission that he "may have been in error," I find no evidentiary basis for disturbing his non-S&S findings. In my view, a serious violation is not ipso facto a significant and substantial violation. The Commission's standards and criteria for determining a significant and substantial violation have been addressed in Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981); Mathies Coal Company, 6 FMSHRC 1, 3-4 (January 1984); United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), and the cases cited therein.

The inspector's rationale for his non-S&S findings was based on the fact that an injury was unlikely because the plant was not operating at the time of the inspection, and there is no evidence that it was in production when the guards were not in place. More to the point, however, is the inspector's candid admission that the degree of hazard exposure can only be determined by asking relevant questions during an inspection with respect to the actual work which may have been performed in the proximity of the unguarded locations while the crusher was being operated. Although the inspector conceded that the actual hazard exposure could not be determined because the crusher was not in operation at the time he observed the violative conditions, it seems obvious to me from the lack of any evidence or testimony on his part to the contrary, that he made no inquiries so as to establish any factual basis in support of any conclusion that the guarding violations were in fact significant and substantial, and no evidence or testimony was advanced by the petitioner to establish that this was in fact the case.

Significant and Substantial Violation (Citation No. 3461132, 30 C.F.R. § 56.15002)

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, (August 1985), the Commission stated further as follows:

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The inspector's un rebutted testimony, which I find credible and probative, establishes that when he observed the truck driver operating the loader and loading the truck without wearing a hard hat, the loader bucket was raised 8 to 10 feet above the loader, and the inspector observed rocks spilling out of the bucket. He concluded that it was reasonably likely that the driver operating the loader would incur serious injuries if he were struck by a falling rock. Although Mr. Peters claimed that the loader had a steel plate covering over the canopy, the evidence establishes that it had no windshield and that it was open on both sides of the operator's compartment. The fact that the loader had a steel plate over the canopy, would not in my view, preclude any falling rocks from the raised bucket from entering the otherwise unprotected operator's compartment and striking the driver in the head. Under the circumstances, I agree with the inspector's S&S finding, and it is affirmed.

Negligence

Inspector Turner made findings of "high negligence" for five of the citations he issued on September 13, 1988, (Nos. 3285841, 3285843, 3285845, 3285846, 3285849), and "moderate negligence" for four citations (Nos. 3285844, 3285848, 3285850, 3285855). He made a finding of "high negligence" for the citation he issued on June 1, 1989 (No. 3461132).

Mr. Turner stated that his negligence findings were based on whether or not the cited conditions were readily observable to the respondent, and if the violations occurred in any "hidden" area where the respondent could not see them, he would consider this to be a lesser degree of negligence. As an example, he explained that his "high negligence" finding with respect to Citation No. 3285843, for failing to guard the crusher tail pulley, mechanical belt, and V-belt drive pulley located at the approach ramp to the crusher would be readily observable because mobile equipment used to feed the crusher used the ramp (Tr. 35). No further testimony was forthcoming from the inspector with regard to his negligence findings made on September 13, 1988, other than the fact that Mr. Peters acknowledged that he knew that the cited equipment needed to be guarded (Tr. 35).

I conclude and find that the respondent knew or should have known about the conditions which prompted the inspector to issue the citations on September 13, 1988, and that its failure to exercise reasonable care to insure compliance with the cited mandatory standards constitutes ordinary negligence.

With regard to the citation issued on June 1, 1989, for the failure of a truck driver to wear a hard hat, the inspector stated that he based his "high negligence" finding on the fact that he and Mr. Peters had previously discussed the need for employees to wear hard hats while on the property. Although the inspector confirmed that he spoke with the employee in question, he could not recall whether the employee gave him any explanation for not wearing a hard hat, nor could he recall where the hard hat was located or from where the one supplied to abate the citation was obtained.

Mr. Peters testified that he often spoke with his employees about wearing their hard hats, and he confirmed that he furnished a hard hat to the cited employee, but that he had it in his truck and had not bothered to put it on. This testimony is un rebutted, and I find it credible. Although the respondent is liable for the violation without regard to fault, I find that the negligence of the employee in failing to wear the hard hat furnished to him by the respondent mitigates the respondent's negligence and any civil penalty which may be assessed for the violation. Under the circumstances, I conclude and find that the violation resulted from a low degree of negligence by the respondent.

Good Faith Compliance

I conclude and find that Citation Nos. 3285841, 3285855 (continuity and resistance tests and fire extinguishers) were abated in good faith by the respondent within the extended abatement time. The hard hat citation (3461132) was abated within 3 minutes.

With regard to the remaining citations, the record reflects that when the inspector returned to the site on May 31, 1989, after previously extending the abatement time, he found that the respondent had made "no apparent effort" to secure the guards at some locations, install guards at other locations, or to remedy or correct the other cited conditions. As a result of these findings, he issued seven section 104(b) orders. MSHA's proposed civil penalty assessment amounts for the violations obviously reflect the fact that orders were issued, and I believe that it is reasonable to conclude that the inspector's belief that no effort had been made to correct the cited conditions resulted in the maximum number of penalty points for a lack of good faith compliance by the respondent.

As noted earlier, although the respondent does not dispute the fact that the cited conditions constitute violations of the cited standards, the crux of its contest lies in its dispute with the inspector's belief that it made no apparent effort to correct the cited conditions. Mr. Peters maintained that at the completion of the inspection on September 13, 1988, the inspector informed him that as long as the crusher plant was not in production and was not running, there would be no problem. Mr. Peters testified that he paid no particular attention to the 1-week abatement period fixed by the inspector, and that it was his understanding that he could make the necessary corrections during the winter season when the crusher was not in production. Mr. Peters further testified that the crusher was not in production from September 13, 1988, until the violations were ultimately abated. The inspector confirmed that all of the cited conditions were ultimately corrected, and he had no reason to dispute Mr. Peters' testimony that the plant was not operated before the corrections were corrected and abated.

The inspector testified that his normal procedure is to inform an operator that if there is a violation, the plant should not be operated until the violation is corrected, and he believed that this is what he told Mr. Peters during his initial inspection on September 13, 1988. The inspector also agreed that it was possible that Mr. Peters was under the impression that he may have had a week to fabricate the guards, but could wait until the crusher was placed in production before installing them.

Mr. Peters testified credibly that when the inspector next returned to the site on February 23, 1989, for a follow-up inspection, several guards which he had constructed were available and were laying by the machine, and the inspector again informed him that there was no problem as long as the citations were corrected before he went into production. Mr. Peters stated that he and the inspector again discussed the fact that the crusher could not be operated until the cited conditions were corrected, but that the inspector said nothing about any specific

dates for abatement, and that he (Peters) did not look at the extension "paperwork" left by the inspector. Mr. Peters confirmed that he told the inspector the violations would be remedied prior to any future start-up of the crusher plant, and the inspector confirmed that this is what Mr. Peters told him and that he wrote this on one of the extension forms which he issued on February 23.

The inspector testified on direct-examination that he could not recall whether he spoke with Mr. Peters, Mr. Bagley, or both of them on February 23, when he extended the abatement times. His inspection report, with the attached copies of the extension notices, reflects that they were given to "office personnel," and the inspector could not recall giving them to Mr. Peters. He confirmed that he made no inspection notes on February 23, and acknowledged that he may have given the extensions to Mr. Bagley or left them in the office. The inspector's asserted lack of any recollection of speaking with Mr. Peters contradicts his earlier testimony that Mr. Peters assured him on February 23, that the violations would be remedied prior to any start-up of the crusher. Further, his notation that he left the extensions with office personnel, and may have given them to Mr. Bagley, or left them in the office, corroborates Mr. Peters' assertion that they were not given to him and he did not see them. Although the inspector indicated that the fact that the extensions were issued suggests that he discussed the termination dates with Mr. Peters, he made no notes to confirm this, and he acknowledged that he had no independent recollection of discussing the extended termination dates with Mr. Peters. Under the circumstances, and in light of the inspector's lack of recollection and contradictory testimony, I give greater weight to Mr. Peters' testimony which I find credible.

With regard to the inspector's return visit on May 31, 1989, when he issued the section 104(b) orders, after concluding that "no apparent effort had been made" to correct the cited conditions, the inspector testified that "I can't really say that I talked to Mr. Peters that day" (Tr. 10). His "assumption" that he spoke with Mr. Peters was based on the fact that he issued the orders. Although the inspector confirmed that he took notes which would refresh his recollection, and that a "conference sheet" which he filled out reflected that he did speak with Mr. Peters about "all the changes to orders, 104-B orders," the notes and conference sheet were not produced and they are not a matter of record.

Mr. Peters testified that he was occupied with certain truck repairs on May 31, and did not accompany the inspector during his inspection. He relied on the inspector's prior statements that there would be "no problem" as long as the crusher was not operated before the abatement of the violations. Mr. Peters maintained that he had in fact made efforts to comply by fabricating

most of the required guards which were there and which the inspector saw. Mr. Peters maintained that he had no opportunity to explain his abatement efforts to the inspector because he was busy repairing the truck while the inspector was writing up the orders.

The inspector confirmed that Mr. Peters did not accompany him on his inspection because he was busy repairing a truck and told him "go on, do what you have to do" (Tr. 63). He testified that he made some notes during his inspection, and when he finished, he told Mr. Peters that he would have to issue the orders, and gave them to him. He stated that he discussed the orders with Mr. Peters, and when asked about what was discussed, the inspector stated that he told Mr. Peters that the plant will not operate until the violations were remedied, and he then left the property.

Although the section 104(b) orders are not directly in issue in these proceedings and there is no indication that the respondent filed any separate contests within the required time period challenging the propriety of the orders, they are relevant to the civil penalty assessments proposed by the petitioner, and the mitigating arguments advanced by the respondent in support of its assertion that it had made some effort at compliance. In this regard, I take note of the fact that one of the orders makes reference to a lack of a guard bottom on the crusher flywheel. The underlying citation noted that the flywheel had not been guarded at all. The inspector agreed that in this instance, the flywheel was guarded on the top and sides on May 31, and that some work had been performed and an effort was made to at least guard the flywheel (Tr. 15). That same order makes reference to the fact that no effort was made to secure a tail pulley guard which was not on the equipment when it was initially cited. This leads me to conclude that prior to May 31, an effort had been made to fabricate the guard, and it was simply not secured at that time. I also take note of the inspector's testimony that the respondent was constructing guards when he inspected the site on September 13.

With regard to another order issued for failing to guard a conveyor tail pulley under the crusher, although the order states that no effort was made to secure the guard, the inspector believed that there may have been a change in the condition as originally cited, and I believe it is reasonable to conclude that a guard had been fabricated but was not in place or secured to the tail pulley pinch point on May 31. These instances of what I construe to be partial abatement efforts, corroborate Mr. Peter's assertions that he had made an effort to fabricate the guards, and had in fact done so, but had not secured or installed them.

On the facts of this case, while it is true that the respondent had not completely abated the most of the violations during

the extended abatement periods, I conclude and find that it had made some effort at compliance by fabricating the guards which were available when the inspector returned on May 31, 1989. Having viewed Mr. Peters during the course of the hearing, I find him to be a credible witness, and I conclude that notwithstanding the abatement extension dates which were on the citations and extension notices, that it was not unreasonable for Mr. Peters to believe that complete abatement was not required until such time as the crusher plant went into full production after the winter season. I further conclude that it was not unreasonable for Mr. Peters to believe that he could wait until after he had completed the installation of the crusher and placed it into full production before completely abating the cited conditions. Accordingly, I have taken this into consideration in mitigation of the civil penalty assessments which I have made for the violations.

Civil Penalty Assessments

Although MSHA has in the past routinely assessed "single penalty" non-S&S violations at \$20, its procedures for making such assessments (Part 100, Title 30, Code of Federal Regulations) have been revised on an interim basis pending a permanent revision of its assessment regulations. These interim revisions are the result of a November 21, 1989, court decision in Coal Employment Project, et al. v. Secretary of Labor, (Court of Appeals for the D.C. Cir. No. 88-1708). However, it is clear that I am not bound by MSHA's proposed civil penalty assessments, and that once a penalty is contested and Commission jurisdiction attaches, a judge's determination of the amount of the penalty is de novo, based upon the statutory penalty criteria and the record developed in the adjudication of the case. See: Sellersburg Stone Company, 5 FMSHRC 287 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984); United States Steel Mining Co., Inc., 6 FMSHRC 1148 (May 1984).

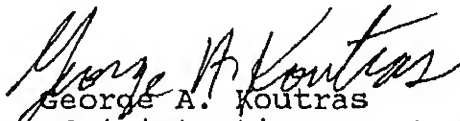
On the basis of the foregoing findings and conclusions, and taking into account the six statutory civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that the following civil penalty assessments are reasonable and appropriate in the circumstances of this case.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
3285841	09/13/88	56.12028	\$ 20
3285843	09/13/88	56.14001	\$125
3285844	09/13/88	56.12008	\$ 95
3285845	09/13/88	56.11012	\$125
3284846	09/13/88	56.14001	\$ 95
3285848	09/13/88	56.14003	\$ 90

3285849	09/13/88	56.14001	\$125
3285850	09/13/88	56.14003	\$ 85
3285855	09/13/88	56.4201(b)	\$ 20
3461132	06/01/89	56.15002	<u>\$ 50</u>
			\$830

ORDER

The respondent IS ORDERED to pay civil penalty assessments in the amounts shown above within thirty (30) days of the date of this decision and order. Payment is to be made to MSHA, and upon receipt of payment, this matter is dismissed.


 George A. Koutras
 Administrative Law Judge

Distribution:

George B. O'Haver, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson Street, Suite 1020, San Francisco, CA 94105 (Certified Mail)

Leo M. Cook, Esq., P.O. Box 418, Ukiah, CA 95482 (Certified Mail)

Mr. Robert Peters, Peters Trucking Company 266 Shell Lane, Willits, CA 95490 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 22 1990

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 90-72-D
ON BEHALF OF DON B. COLEMAN,	:	PIKE-CD-89-15
Complainant	:	
v.	:	No. 5 Mine
	:	
RAMBLING COAL COMPANY, INC.,	:	
Respondent	:	

DECISION

Appearances: G. Elaine Smith, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee, for
Complainant; Billy R. Shelton, Esq., Baird &
Baird, Pikeville, Kentucky, for Respondent.

Before: Judge Maurer

This proceeding concerns a discrimination complaint filed by the Secretary of Labor (Secretary) on behalf of the affected miner, Don B. Coleman, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c), hereinafter referred to as the "Act".

On January 22, 1990, a Discrimination Complaint was filed with the Commission alleging that Mr. Coleman was unlawfully discriminated against and discharged by Respondent on August 3, 1989, for engaging in an activity protected by section 105(c)(1) of the Act. More particularly, the Complaint alleges that Coleman's discharge on August 3, 1989, was the direct result of his stated refusal to perform work (operate a machine) which he believed to be unsafe.

Pursuant to notice, a hearing on the merits was held in this matter on May 17, 1990, in Prestonsburg, Kentucky. Post-hearing proposed findings and conclusions were filed by the Secretary on July 10, 1990, and by the Respondent on July 5, 1990. I have considered these submissions along with the entire record in making this decision.

STIPULATIONS

The parties stipulated to the following which I accept:

1. Rambling Coal Company, Inc., is the owner-operator of the No. 5 mine in Pikeville, Pike County, Kentucky.

2. The mine is subject to the Federal Mine Safety and Health Act of 1977.

3. The Federal Mine Safety and Health Review Commission and the presiding Administrative Law Judge have jurisdiction to hear and decide this matter.

4. Mr. John South is a designated and authorized representative of the Secretary of Labor.

5. The Complainant, Mr. Don B. Coleman, was discharged by Rambling Coal Company, Inc. on August 3, 1989.

6. At the time of his discharge on August 3, 1989, Don B. Coleman's wage rate was \$60.00 per day.

7. According to Respondent's history of previous violations in the 24 months preceding the violation charged in this action, the Respondent had 177 inspection days, 104 assessed violations, .58 violations per inspection day and no previous violations prior to that time.

8. The Respondent is a small operator producing 172,625 tons per year. The No. 5 Mine produces 172,625 tons per year.

FINDINGS OF FACT

Having considered the record evidence in its entirety, I find that a preponderance of the reliable, substantial and probative evidence establishes the following findings of fact:

1. Complainant (Coleman) was employed by Respondent (Rambling) as an outside man. He began his employment with Rambling in March of 1989. He was employed at the No. 5 mine from that date until his discharge on August 3, 1989. His duties as an outside man were servicing batteries, greasing equipment and checking fluid levels on the equipment and adding fluid, if required. As part and parcel of performing his job duties, he was required to operate the small front end loader that is the subject of this case.

2. Danny Skeens, a coal hauler employed by Moody Trucking Company, used this front end loader on the afternoon of August 2, 1989. He noticed that the brakes on the equipment were getting weak and he notified Coleman and another man of that fact.

3. Skeens returned to the site early on the morning of August 3, 1989. He attempted to use this front end loader, but found that it had no brakes. Skeens reported this to

Sammy Williams and Roy Alley, the superintendent.

4. On August 3, 1989, Coleman arrived at the mine site for work at approximately 6:00 a.m. for his first day on the day shift. By 7:00 a.m., he was discharged. This is also the approximate time period when Skeens discovered and reported that the front end loader had no brakes.

5. Coleman did not check the end loader's brakes that morning. He already knew the equipment did not have any brakes as of the previous evening, which was his last turn on the second shift. Coleman had reported this fact to Sam Williams, the company mechanic and only other person working with him on the previous night's shift. Shortly after his arrival at work on the morning of August 3, 1989, Coleman also informed Roy Alley that the front end loader had no brakes.

6. Coleman credibly testified concerning that conversation with Roy Alley as follows (Tr. 64):

Q. What was the nature of your conversation with Mr. Alley?

A. Well, I went up to him, and I told him, I said, 'Roy, that end loader doesn't have any brakes,' and I said, 'And I know I'm going to have to be running it a lot,' and I said, 'I would like to have them fixed,' I said, 'I fear for myself as much as the other people, to run that piece of equipment, 'cause it's not safe and I don't want to run it with it not safe like that, with no brakes on it.'

Q. And what was Mr. Alley's response?

A. He said, 'Okay, I'll take care of it, I'll talk to Steve [Horton],' and then he talked to Steve, and 20 minutes later he come back over and said him and Steve decided that I've got an attitude problem.

Complainant Coleman was then discharged. Roy Alley was not available at the hearing, but it is clear from the record, both from the testimony of Coleman and Steve Horton, the owner of the business, that Coleman was fired by Alley at the direction of Mr. Horton, after registering the above safety complaint.

7. Immediately after his discharge, Coleman reported the firing and his complaint concerning the brakes to both the Kentucky Department of Mines and Minerals and the Mine Safety and Health Administration (MSHA). Both agencies responded by sending an inspector to investigate.

8. Walter Coleman (no relation to the Complainant) is a mine inspector for the state of Kentucky. He was the first inspector to arrive on the mine site. He arrived at the mine site at approximately 7:15 a.m., on August 3, 1989. He inspected the front end loader and confirmed it had no brakes. He notified Mr. Horton, who along with Sammy Williams put brake fluid in the end loader and bled the brakes.

9. Parenthetically, I find as a fact that bleeding the brakes is a two man job. Coleman could not have bled the brakes by himself, even if he knew how, which he claims he does not.

10. Horton and Williams were able to restore working brakes to the front end loader in a matter of minutes utilizing the procedure noted in Finding of Fact No. 8.

11. Mr. Horton had experienced an unrelated servicing problem with the end loader a few days prior to the incident at bar. On that occasion, the end loader could not be used because the transmission was out of fluid. At that time, Steve Horton warned both Sammy Williams, Jr. and Don Coleman to make sure the equipment was serviced and in condition to operate at all times. Both men were warned because both were considered to be responsible for the condition of the equipment.

12. Horton's stated policy was to give only one disciplinary warning before firing a worker and in this case Respondent's assertion is that as of August 3, 1989, Coleman already had his prior warning. Therefore, when he allegedly did not put brake fluid in the end loader on August 2, 1989, or let somebody know that the end loader did not have brakes prior to that morning of August 3, he was fired for this reason, i.e., not doing his job, not for complaining about the lack of brakes on the equipment.

13. However, I find as a fact that Coleman did put brake fluid into the end loader on August 2, 1989, but without bleeding the brake lines, this was ineffective. I also find as a fact that Coleman notified the company mechanic that the brakes were defective before leaving the premises on August 2, 1989.

DISCUSSION WITH FURTHER FINDINGS

Generally, in order to establish a prima facie case of discrimination under section 105(c) of the Mine Act a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary

on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511, (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the Complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, 462 U.S. 393, 76 L.Ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

Additionally, where reasonably possible, a miner refusing work ordinarily must communicate or attempt to communicate to some representative of the operator his belief that a hazardous condition exists. Secretary on behalf of Dunmire & Estle v. Northern Coal Co., 4 FMSHRC 126, 133-135 (February 1982); Dillard Smith v. Reco, Inc., 9 FMSHRC 992 (June 1987); Miller v. Consolidation Coal Company, 687 F.2d 194, 195-97 (7th Cir. 1982) (approving Dunmire & Estle communication requirement).

In the instant case, I find that Mr. Coleman's safety complaint to Superintendent Alley on August 3, 1989, concerning the brakes or lack thereof on the front end loader was protected activity. Without question, the end loader had no operable brakes on it and also without question it would be hazardous to mine site personnel to operate it in that condition.

Rambling's position is that this protected activity had nothing to do with Coleman's discharge. Rather, Mr. Horton states that it was Coleman's failure to perform his job, i.e., service Rambling's equipment on the second shift, that led to his discharge. It is Horton's testimony that the equipment should have had brakes on it on the morning of August 3, 1989, and if it did not it was Coleman's fault. According to Mr. Horton "[t]he problem was he [Coleman] did not put the brake fluid in the end loader or let somebody know that the end loader did not have brakes on it prior to that morning [August 3, 1989]." Tr. 131.

However, Mr. Coleman testified and I find it to be credible testimony, that on the evening of August 2, 1989, he attempted to service the equipment by adding brake fluid. This simple addition of brake fluid, however, without bleeding the brakes was ineffectual. He also testified and I find it credible that he then informed the company's mechanic that the equipment had no operable brakes. He himself had no mechanical expertise and this was all he could do prior to leaving the shift for the evening. He personally did not know what was wrong with the brakes and did not know how to fix them. Shortly after his arrival the next morning he made the same report or complaint to Roy Alley that swiftly led to his discharge.

Turning now to the issue of whether the discharge was motivated by the protected activity, I first note the close proximity in time and space between the safety complaint concerning the brakes and the resultant discharge. This alone is strong circumstantial evidence that the two events are related.

Additionally, there was one earlier incident where Coleman had failed to service a piece of equipment for which he was responsible along with another employee, Sammy Williams, and both had been warned by Horton. In this case, the same division of responsibility would seem appropriate also. Both Sam Williams, Sr., the mechanic, and his son, Sammy Williams, were also responsible for servicing and maintaining this equipment, along with Coleman. So, even if Coleman was somewhat responsible in this instance for there being no brakes on the end loader it would seem that Sam and Sammy Williams were at least equally responsible.

Importantly, only Coleman complained or made an issue of it and only Coleman was fired. I therefore find that he was discharged as a direct result of engaging in protected activity. Since the operator has been unable to rebut this prima facie case, I also find that a violation of section 105(c) of the Act stands proven. The complaint of discrimination is therefore **SUSTAINED**.

REMEDIES

Turning now to Complainant's remedies, I find that he was unemployed between August 3 and August 29, 1989, for a total of 18 working days at a rate of pay of \$60 per day. This amounts to \$1080. However, Complainant collected \$414 in unemployment compensation during this time period and that must be subtracted. This leaves a total loss of pay of \$666. The payment of interest will also be ordered on this award until the date of payment.

Respondent will also be ordered to reimburse Complainant for his reasonable costs. He claims \$275.52 for expenses incident to locating a new job and I find this to be very reasonable.

Finally, the Secretary seeks a civil penalty in this case. Considering the criteria under section 110(i) of the Act, I find that a civil penalty of \$500 is appropriate, and will be ordered.

ORDER

Based on the stipulations and the foregoing findings of fact and conclusions of law, Respondent **IS ORDERED**:

1. To pay Don B. Coleman back pay through August 29, 1989, in the amount of \$666, within 30 days of the date of this order.

2. To pay Don B. Coleman interest on that amount from the date he would have been entitled to those monies until the date of payment, at the short-term federal rate used by the Internal Revenue Service for the underpayment and overpayment of taxes, plus 3 percentage points, as announced by the Commission in Loc. U. 2274, UMW v. Clinchfield Coal Co., 10 FMSHRC 1493 (November 28, 1988).

3. To pay Don B. Coleman \$275.52 as reimbursement for costs.

4. To pay the Secretary of Labor a civil penalty in the amount of \$500 for the violation found herein within 30 days of the date of this order.



Roy J. Maurer
Administrative Law Judge

Distribution:

G. Elaine Smith, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

Billy R. Shelton, Esq., Baird & Baird, P.S.C., 415 Second Street, Pikeville, KY 41501 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
THE FEDERAL BUILDING
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

OCT 22 1990

WYOMING FUEL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 90-112-R
v.	:	Order No. 2930784; 2/13/90
	:	
SECRETARY OF LABOR,	:	Docket No. WEST 90-113-R
MINE SAFETY AND HEALTH	:	Citation No. 2930785; 2/13/90
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. WEST 90-114-R
	:	Order No. 3241331; 2/16/90
	:	
	:	Docket No. WEST 90-115-R
	:	Citation No. 3241332; 2/16/90
	:	
	:	Docket No. WEST 90-116-R
	:	Citation No. 3241333; 2/16/90
	:	
	:	Golden Eagle Mine
	:	MSHA Mine ID No. 05-02820
	:	
	:	Consolidated

DECISION

Appearances: Timothy E. Biddle, Esq., Susan E. Chetlin, Esq.
Crowell & Moring, Washington, D.C.,
for the Contestant;
Margaret A. Miller, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for the Respondent.

Before: Judge Morris

These consolidated cases are before me pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act") to challenge orders and citations issued to Wyoming Fuel Company ("WFC").

After notice to the parties an expedited hearing on the merits was held in Denver, Colorado.

The parties filed post-trial briefs.

Summary of the Cases

These consolidated cases involve two imminent danger orders and three citations.

WEST 90-112-R: In this case, WFC contests Order No. 2930784 issued under § 107(a) of the Act by MSHA Inspector D.L. Jordan on February 13, 1990.

The order alleged an imminent danger existed. The order further closed the Golden Eagle Mine and ordered all personnel withdrawn from underground. The order reads as follows:

Methane in excess of 9.9% as approved by a hand-held detector at a point at least 12" from the roof face and ribs was present behind a line of 6 Kennedy stoppings that have been constructed across the second south entry at the intersection of the number 14 west main return. This encompass area behind the stoppings six (6) entries wide and 25 crosscuts deep. Bottle samples were collected to substantiate the the order. Citation No. 2930785 for a violation of 30 C.F.R. § 75.329(a)(1) accompanies this order at section 8, "Condition or Practice".

A subsequent modification of the order was issued February 13, 1990, to allow construction of seals in 2d South. The modification reads:

... allow construction of seals in second south as per attached sealing plan as submitted and approved 2/13/90. No other work will be done until the order is terminated ... (MSHA Order No. 2930784-01, "Subsequent Action" at section II, "Justification for Action").

Subsequently, on February 17, 1990, the order was again modified as follows:

The affected area in 2 South, West Main has now been sealed, Order No. 2930784 is further modified to allow the operator to resume mining operations. The Order will remain in effect to monitor the seals [sic. for methane] in 2 South every two (2) hrs. for a 72 hrs. period ... 107(a) (MSHA Order No. 2930784-03, "Subsequent Action" at section II, "Justification for Action").

Only those persons necessary to monitor the gases and to safeguard the mine are to be al-lowed underground. ... 107(a) (MSHA Order No. 2930784-02, "Subsequent Action" at section II, "Justification for Action").

WEST 90-113-R: In this case, WFC contests Citation No. 2930785 issued by Inspector Jordan.

The citation, issued under § 104(a) of the Act, alleges a violation of 30 C.F.R. § 75.329-1.

The citation reads as follows:

Methane ranging from .6 to 9.9% was present in front of and behind a line of Kennedy stoppings that were constructed across the second South Entries at the intersection with No. 14 West Main return entry, encompassing an area of 6 entries, 25 cross-cuts deep. This creates a situation of neither being sealed or ventilated, a violation of 30 C.F.R. § 75.329-1(a).

This was the main contributing factor to the issuance of imminent danger Order No. 2930784. Therefore no abatement time was set.

The regulation allegedly violated in its full text provides as follows:

§ 75.329 Bleeder systems.

[Statutory Provision]

On or before December 30, 1970, all areas from which pillars have been wholly or partially extracted and abandoned areas, as determined by the Secretary or his authorized representative, shall be ventilated by bleeder entries or by bleeder systems or equivalent means, or be sealed, as determined by the Secretary or his authorized representative. When ventilation of such areas is required, such ventilation shall be maintained so as to continuously dilute, render harmless, and carry away methane and other explosive gases within such areas and to protect the active workings of the mine from the hazards of such methane and other explosive gases. Air coursed through underground areas from which pillars have been wholly or partially extracted which enters another split of air shall not contain more than 2.0 volume per centum of methane, when tested at the point it enters such other split. When sealing is required, such seals shall be made in an approved manner so as to isolate with explosion-proof bulkheads such areas from the active workings of the mine.

§ 75.329-1. Sealing or ventilation of pillared of abandoned area.

(a) All areas of a coal mine from which the pillars have been wholly or partially extracted and abandoned areas shall be ventilated or sealed by December 30, 1970. For those coal mines in which ventilation can be maintained so as to continuously dilute, render harmless and carry away methane and other explosive gases within such areas and to protect the active workings of the mine from hazards of such methane and other explosive gases, the operator shall request permission from the Coal Mine Safety District Manager in whose district the mine is located to ventilate such areas.

(b) The request for permission to ventilate such areas must be submitted in time to allow consideration of the request, to obtain approval, and to permit the operator to install the ventilation system, or to install seals in the event the request to ventilate is denied, on or before December 30, 1970.

(c) The determination of whether ventilation will be permitted will be made after taking into consideration the history of methane and other explosive gases in the mine, the size of the gob or abandoned areas, and if the areas can be ventilated adequately.

(d) To be considered for approval the request shall contain the following information provided by the mine operator:

- (1) Name of mine and company.
- (2) Location of mine (town, county, state).
- (3) Operator's name and address.
- (4) Date of application.
- (5) A detailed history of the methane content determined throughout the mine and when available, the volume of air in which such methane determinations were made, to support the operator's application to ventilate.

(e) A description of the method by which the areas from which the pillars have been wholly or partially extracted and abandoned areas shall be ventilated and such maps and drawings as may be required to illustrate such method and to indicate existing, or proposed air volumes used to ventilate such areas.

(f) The signature and title of the person who submits the application for the operator.

WEST 90-114-R: In this case WFC contests Order No. 3241331 issued by MSHA Inspector A. Duran on February 16, 1990.

The order alleged a condition of imminent danger existed. The order was accomplished by Citation No. 3241332 and subsequently by Citation No. 3241333. The order required that all personnel be withdrawn from the underground area.

Order No. 3241331 reads as follows:

An unknown mixture of methane/air could not be determined at the Kennedy stopping constructed at #1, #2, and #3 entries of 1 - Right due to [sic. the condition] that there was no means of testing or detecting what mixture was behind the stoppings. #1, #2, and #3 were being ventilated with the use of a line curtain from #7 right return entry of 3d North. When No. 2 entry stopping was not ventilated methane of 10% plus volume percentum was detected 12 inches from the roof and face of the stopping with the use of a permissible hand held methane detector. Bottle samples were collected at leakage areas of the stopping to substantiate the order.

WEST 90-115-R: In this case WFC contests Citation No. 3241332. This citation, issued under § 104(a) of the Act, accompanied Order No. 3241331.

The citation alleges a violation of 30 C.F.R. § 75.329(1)(a), cited supra.

The citation reads as follows:

Methane/air mixture ranging from 0 to 10% plus volume percentum was detected with the use of a hand held methane detector when check 12 inches from the roof and face of #2 Kennedy stopping erected in the No. 2 entry of 1 Right. This was detected when the line curtain was removed that was ventilating the stopping. Other means of testing or detecting what mixture was behind the stopping was not provided at #1, #2, and #3 Kennedy stopping. This creates a situation of neither being sealed or ventilated, a violation of CFR 30 75.329-1(a). This was a contributing factor to issuance of an imminent danger 107(a) #3241331, therefore no abatement time was set.

WEST 90-116-R: In this case WFC contests Citation No. 3041333 which was issued after Order No. 3241331.

The citation alleges as follows:

This citation is issued for working in the face of a 107(a) Imminent Danger withdrawal Order No. 2930784 dated 02/13/90. The Company was observed in the process of constructing permanent seals in an entirely different area of the mine. 1 Right panel off 32d North without prior authorization or notification to MSHA. In addition the employees were exposed to an Imminent Danger due to an explosive gas mixture behind and in front of Kennedy stopping erected in #1, #2 and #3 entries of 1 Right Panel. Six employees and a Foreman was observed working in the immediate area. Employees stated the work had started on 02/14/90 to present 02/16/90 on the day shift.

Procedural Issues

WFC moved for an expedited hearing in these cases. The Secretary opposed and an expedited hearing was held.

The issue is again raised in this decision and the Commission is invited to consider the issue anew.

In support of its motion for expedition, WFC relies on the statutory requirements set forth at section 107(a) of the Act. The cited section provides as follows:

(e) Relief from orders; hearing; order; expedited proceeding.

(1) Any operator notified of an order under this section or any representative of miners notified of issuance, modification, or termination of such an order may apply to the Commission within 30 days of such notification for reinstatement, modification or vacation of such order. The Commission shall forthwith afford an opportunity for a hearing ... and thereafter shall issue an order, based on findings of fact, vacating, affirming, modifying, or terminating the Secretary's order. The Commission and the courts may not grant temporary relief from the issuance of any order under subsection (a).

(2) The Commission shall take whatever action is necessary to expedite proceedings under this subsection. (§ 107(e), (1) and (2), Emphasis added).

In opposition to the motion the Secretary states the 107(a) orders have been modified to permit mining activity. Further, the modified order simply requires that methane samples be taken each day to determine the stability of the methane since the construction of the permanent seals. The Secretary also contends that if all orders issued under § 107 were expedited on request, there would no longer be any capability for expeditious hearings.

The Secretary further asserts the Congressional intent of Section 107(a) is to assist operators where an emergency situation exists. In short, the Secretary argues Congress intended to allow an expedited hearing only in the case of an active closure order, where the mine is not being allowed to produce and is suffering a great hardship as a result of an MSHA order.

It is also urged that the matter of whether a hearing should be expedited rests with the sound discretion of the presiding judge.

The Secretary also contends the Commission Rules are so structured that expedited hearings are allowed only in emergency situations.

Discussion

It is a basic rule of construction that where the language is clear the statute must be enforced as it is written unless it can be established that Congress clearly intended the words to have a different meaning. Chevron, USA v. NRDC, 467 U.S. 837, 842-43, 104 S.Ct. 2778 (1984); United States Lines v. Baldridge, 677 F.2d 940, 944 (D.C. Cir. 1982); Phelps Dodge Corp. v. Federal Mine Safety and Health Review Commission, 681 F.2d 1189, 9th Cir. (1982); Freeman United Coal Mining Co., 6 FMSHRC 1577, 1578 (1984).

The statutory requirement, stripped of surplus language, is that "any operator ... notified of an order, etc., may apply within 30 days ... for a vacation of such order, etc." In such a situation, "the Commission shall expedite proceedings."

It is uncontroverted here that these cases involve orders issued under the authority of Section 107(a) of the Act. The contests were filed within 30 days.

The foregoing uncontroverted facts require that these cases be expedited. I agree with the Secretary that Congress may have intended an expedited hearing only in the event of an active closure order. However, the wording of § 107 does not show such an intent.

Further, the structure of the Commission's Rules do not support the Secretary. Commission Rule 52, 29 C.F.R. § 2700.52, provides as follows:

§ 2700.52 Expedition of proceedings

(a) Motions. A motion of a party to expedite proceedings may be made orally, with concurrent notice to all parties, or served and filed by telegram. Oral motions shall be confirmed in writing within 24 hours.

(b) Timing of hearing. If the motion is granted, a hearing on the merits of the case shall not be scheduled with less than four days notice, unless all parties consent to an earlier hearing.

A fair reading of the statute and the Commission rules indicate that expeditious hearings involving § 107(a) orders are generally not left to the discretion of the presiding judge; further, expedited hearings are not necessarily restricted to "emergency" situations.

I agree the failure to read "emergency situation" into the Act and Rule 52 could render the expedited hearing process meaningless. However, the writer has never found the expedited hearing process to be burdensome, nor have any litigants attempted to "overload" the Commission with requests for expeditious proceedings. If this were to become a problem interfering with the Commission's duties of adjudicating disputes under the Mine Act, the Commission would no doubt amend Rule 52. In such circumstances the appellate courts would accord great deference to the Commission's interpretation of its own rules. Lucas Coal Company v. Interior Board of Mine Operations Appeal, 522 F.2d 581 (1975).

In sum, under the Mine Act, contestant is entitled to an expedited hearing when a § 107(a) order is involved.

If the orders here had been issued under § 104(d) of the Act, a totally different result would have occurred. ^{1/} Under section 105(B)(2), [30 USC § 815(b)(B)(2)], the Commission may grant temporary relief from a 104(d) order only under very restrictive conditions. These are:

(A) a hearing [before MSHA] has been held in which all parties were given an opportunity to be heard;

(B) the applicant shows that there is substantial likelihood that the findings of the Commission will be favorable to the applicant; and

(C) such relief will not adversely affect the health and safety of miners.

No temporary relief shall be granted in the case of a citation issued under subsection (a) of (f) of section 104. The Commission shall provide a procedure for expedited consideration of applications for temporary relief under this paragraph.

In sum, I reaffirm the previous ruling granting WFC an expedited hearing.

^{1/} See Order in Medicine Bow Coal Co., WEST 90-117-R, March 13, 1990.

Amendment

The original citations and orders herein were issued in February 1990. On March 6, 1990, the Secretary sought to change the allegations from a violation of 30 C.F.R. § 75.329 to a violation of 30 C.F.R. § 75.316.

The operator's objection to the amendment was sustained for the reason that MSHA may not amend a citation that has already been terminated. See Clinchfield Coal Company v. Federal Mine Safety and Health Review Commission, 895 F.2d 773, 776 (D.C. Cir. 1990); Emery Mining Corporation/Utah Power & Light Co., 10 FMSHRC 1337, 1346-47 (Morris, J) (Order), review granted (March 9, 1989).

Stipulation

At the commencement of the hearing the parties stipulated as follows:

1. The Golden Eagle Mine is owned by WFC and the mine is subject to the Act.
2. The annual production is 900,000 tons.
3. The Commission and Administrative Law Judge have jurisdiction over this matter.
4. The papers involved in these cases were properly served on the company and can be admitted in evidence.
5. Prior to the orders and citations herein the company received 10 citations for rock dust violations.

Summary of the Evidence

DONALD L. JORDAN has been a coal mine inspector for 19 years; he is a person experienced in mining. He has inspected the Golden Eagle underground mine on numerous occasions and does so for about eight weeks each year.

On February 13, 1990, he inspected the mine accompanied by Mark Bayes, an assistant mine foreman.

On that day he issued a 107(a) imminent danger order in the 2d South area of the mine (Order No. 2930784). Exhibit C-4, a mine map, shows 2d South, 1st Right and other areas discussed in the case.

The 2d South entry, an abandoned area, is 6 entries wide. Its width exceeds 2000 feet.

Inspector Jordan initially saw the Kennedy stoppings (hereafter called Kennedys or stoppings) when he examined the six entries. (The stoppings are shown in Exhibit S-5.) Foam had been applied around the roof and ribs of the stoppings. Stoppings are intended to deflect the air current and seal the area behind them. This was not an adequate procedure because there were numerous ignition sources behind the stoppings and there was an excessive liberation of methane. Therefore, the stoppings would be inadequate as a safety device.

The inspector was alarmed because the area was not sealed. In a couple of the entries the methane concentration went to 1.5 percent. The methane readings were as follows:

No. 1 Entry	.8 percent
No. 2 Entry	.6 percent
No. 3 Entry	1.5 percent
No. 4 Entry	.7 percent
No. 5 Entry	.6 percent
No. 6 Entry	.8 percent

The methane was measured with a methane detector.

In view of the amount of methane present on the ventilated side of the stoppings, the inspector was concerned about the methane concentrations behind the stoppings.

Inspector Jordan then withdrew 1000 to 1200 feet to a telephone and contacted his District Manager, Joe Pavlovich. He indicated to his supervisor that he needed sampling equipment to determine the concentrations behind the Kennedy stoppings. In his opinion there was an explosive mixture of methane behind the seals. Inspector Jordan also directed that the power inby be shut off in order to eliminate some ignition sources. He then examined the stoppings. He detected 2.2 percent methane in one of the entries. This indicated to him that the methane was changing back and forth between the stoppings. He then went to the No. 1 entry and withdrew a sample from behind the Kennedy stopping by using an aspirator pump. The air was trapped in a 50 mm bottle and the sample was sent to Mt. Hope, West Virginia for analysis.

In at least three-fourths of the readings with the methane detectors Inspector Jordan found that the methane exceeded 9 percent. He concluded this was a serious matter and withdrew the men from the mine issuing an imminent danger order for the 2d South area.

He based his order on the fact that the company has had a history of roof falls. Also, he was aware of ignition sources in the area. He considered this to be an imminent danger situation in view of the methane levels immediately behind the stoppings. These factors combined with the size of the area, namely 6 crosscuts wide by 25 crosscuts deep, an area in excess of 2000 square feet.

Inspector Jordan was aware of several sources of ignition such as roof bolts, track and trolley equipment, man doors and such. Also an ignition source could be from a roof fall striking against steel. If given these conditions, he had a reasonable belief that an explosion would occur. In fact, the conditions he found "scared the pants off of" him.

Explosions almost always cause a loss of life and they would propagate beyond the stoppings.

Mr. Jordan and his District Manager agreed that they should take immediate action by withdrawing the miners and retreating to the surface. He was afraid for himself. However, he couldn't be certain there would be an explosion.

They went to the surface and the mine superintendent was notified. A conference was held in the main company office.

The area behind the stoppings was not ventilated. In such a situation he would expect there would either be seals or the area ventilated. One would also expect that explosion-proof bulkheads would have been installed. In addition to the imminent danger order he issued a 104(a) citation. Inspector Jordan did not see any ventilation in the area and he considered the violation to be significant and substantial. The purpose of the seals was to create an atmosphere behind them. Seals have value outby an area as protection if an explosion occurs. A discussion took place with management about possible removal of the stoppings but no one wanted to volunteer to remove the Kennedys.

MSHA officials also discussed with company representatives that travel in 2d South would be restricted. The 107(a) order covered the entire mine but it was modified by Inspector Jordan to allow the company to construct seals but no other work. The operator's activities were limited to the 2d South area.

The inspector agreed that Kennedy stoppings are a recent innovation. In his opinion the condition is imminently dangerous if there is an explosive mixture of methane behind the stoppings and the area is inaccessible.

He indicated a methane detector is accurate to within .1 percent; when the methane concentration is in excess of 9 percent the detector loses its accuracy. Methane is in an explosive range when its concentration to oxygen is between 5 to 15 percent.

If the methane concentration is in excess of 20 percent, the inspector will remove the detector because it is no longer calibrated. Methane concentrations from 16 to 80 percent of oxygen are not explosive mixtures.

Prior to the day of this inspection Mr. Jordan had not seen the Kennedy stoppings in the 2d South area nor in 1st Right. The locations of the stoppings were not shown on the company mine map.

Kennedy stoppings are not explosion-proof bulkheads. This 2500-foot long area could not be ventilated; therefore, it should have been sealed. The purpose of the inspection was not to locate or find Kennedy stoppings. Any abandoned area must be sealed or ventilated. In the ventilation plan Kennedy stoppings could be used but not in lieu of a seal.

In fact, there was no room to build seals outby some of the stoppings. If seals had been constructed the inspector would not have issued his imminent danger order. With Kennedy stoppings in place he would expect to find some methane in the outby side.

Forty feet of tube was used on the aspirator to sample behind the stopping. A span of six entries is 600 feet.

The series of bottle samples that were taken (as shown on Exhibit S-6) justify the imminent danger order. Further, the hand held detectors had shown methane as high as 9 percent.

In 2d South there have been as many as six roof falls. When Inspector Jordan issued his imminent danger order, miners were working only two entries away. Only in one location did Inspector Jordan see any permanent sealing material.

Several hours elapsed from a verbal order of imminent danger at 11 a.m. until the company received the written order. Verbal orders are frequently issued. On the day it issued the imminent danger order, MSHA also wanted to know the company's plans to remedy the conditions. A Kennedy stopping is not the same as a seal. Methane will migrate from area to area. The air outby at the stopping was 37,632 CFM.

ANTHONY DURAN, an MSHA coal mine inspector, carries certificates as an assistant mine foreman in New Mexico. He works at the Golden Eagle Mine two quarters a year.

He inspected the mine on February 13, 1990, and went to the longwall section with Supervisor Joe Pavlovich and the mine foreman. On that date he was called to 2d South but did not take any methane readings. He agreed with Mr. Jordan as to the imminent danger in the area.

Inspector Duran issued an imminent danger order on February 16, 1990, when they were continuing with their inspection. He had learned the company was putting seals in 1st Right. The previous Jordan order had affected the entire mine. Inspector Duran was accompanied by Frank Burko of the company safety department. Six miners and a foreman were putting up seals in 1st Right. Inspector Duran went to the No. 1 and No. 2 stoppings and checked for methane. By using his hand-held methane monitor he found a concentration of methane. It was 1.9 percent to 2 percent at the wall. A methane detector may burn out if the concentration is above 10 percent.

The Kennedy stoppings were in place at 1st Right. He measured the methane at 2 to 5 percent. One of the stoppings had a hole in it and the concentration at that point was 8 percent.

In Inspector Duran's opinion, the concentration of methane is unpredictable in this gassy mine. If an explosion occurred behind the Kennedy stopping, it could propagate into the working area. The inspector also tried to take an air bottle measurement in the No. 3 crosscut but he could not determine if the tubing had gone through the Kennedy stopping. He took a methane reading of 1.9 to 2 percent when the tubing had been put through. Inspector Duran also sampled 3.3 to 2.4 percent on the right hand side and 8 percent at the Kennedy stopping.

He went back to No. 3 entry with two large air bottles and two smaller ones. He then issued a 107(a) order because of the possibility of an imminent danger. He could not see behind the Kennedy stopping. Methane requires an ignition source such as a roof fall. In a roof fall, if the roof bolts popped, they could cause a spark, or steel striking steel could cause a spark. The hazard is a resulting explosion. The inspector felt it was an imminent danger situation because he did not know what was behind the Kennedy stopping. He was also fearful of his own safety.

Inspector Duran issued a citation because WFC was working "on an order." The previous order did not allow working in 1st Right.

The area behind the Kennedy was not being ventilated. There were no seals completed in the 1st Right area. If an explosion occurred it could cause death, but the inspector did not know for certain that an explosion would occur. Inspector Duran did not know the concentration of the methane mixture behind the stoppings. He issued the order because, in his opinion, the return entry could be shut off. He then went to the surface and called his supervisor.

Inspector Duran terminated the 107(a) order when the seals were completed. In addition, the methane tests indicated that the concentration was above 80 percent, which was clearly beyond the explosion range.

The inspector had seen Kennedy stoppings when the Golden Eagle mine was developing the headgate and tailgate. The methane detector used by the inspector was Model MX 240, as shown by Exhibit C-1.

In connection with Order No. 3241331 the inspector detected one reading at 5 percent and one at 8 percent. He recalibrated his instrument every morning and when he returned to the surface.

There were no surveillance tubes in the No. 2 or No. 3 entries. He couldn't tell whether or not the areas behind the Kennedy stoppings were ventilated. Inspector Duran took a sample in 1st Right. The samples taken from 1st Right are noted on Exhibit S-7, an analysis by the Denver Tech support lab.

RONALD L. PHELPS of Trinidad, Colorado, has been an MSHA supervisory inspector since October 22, 1989. He is a person experienced in mining; he has been in the Golden Eagle Mine six times.

Mr. Phelps was contacted by the inspector as to whether or not it was appropriate to issue the imminent danger order. In his supervisory position he has reviewed the records of the Golden Eagle Mine concerning rock dust surveys. In the past, the company has received 26 citations for inadequate rock dust.

Inspector Duran called Mr. Phelps concerning 1st Right. Inspector Duran said work was being done on the 1st Right on two seals but the miners were working in methane concentrations. The materials and tools being used could cause sparks; there was also an unknown methane mixture behind the stoppings.

Based on this information, Mr. Phelps concluded that it was reasonably likely than an explosion could occur. He felt he had no choice but to issue an imminent danger order. He also concluded that MSHA should issue a 104(a) order. He directed that the workers be withdrawn from the mine.

Mr. Phelps traveled to the mine and met with company representatives to establish a plan to complete the seals in 1st Right. He inspected the area and concluded the Kennedy stoppings did not meet the criteria of explosion-proof seals. He returned to the mine the following day and was informed that the seals only lacked a couple of blocks to be completed. Inspector Duran confirmed the completion of the 1st Right seals and MSHA terminated the order on 1st Right. The seals were completed at 12:55 p.m.; upon completion, the order was terminated as to 1st Right. MSHA authorized the resumption of mining but methane samples were required to be taken to verify the integrity of the 2d South seals.

After 72 hours, a favorable positive trend was established but MSHA left the modification in effect. The order was terminated on February 28 when it was indicated the seals were effective.

On the day the order was issued, the inspector met with several company officials, as well as with MSHA representatives Pavlovich and Jordan. At this meeting they discussed the conditions and requested that the company propose how it intended to correct the situation. After the company plan was approved the 2d South order was modified so that miners could safeguard the mine, but no other work was authorized. Also maintenance would be allowed in certain areas to address the problem of water accumulations, etc. The modification, in effect, states that no other work was to be done.

The inspector agreed he was only aware of one safety complaint in connection with 1st Right, a 103(g) complaint. Inspector Melvin Shively concluded after an investigation that the 103(g) complaint was invalid since he found initials in the necessary area. Shively did not tell the inspector about the Kennedy stoppings which were recessed 20 to 30 feet from the return.

On March 13, Mr. Phelps was involved in the dispatch of the inspectors. He assigned each inspector to a section of the mine. The previous evening, Inspector Duran told him that Kennedy stoppings existed across the 2d South entry. In Mr. Duran's opinion this blocked the ventilation; such a condition was a problem.

Mr. Phelps assigned Jordan to the west side and asked him to check the conditions. He did not want an area to be unventilated, nor did he want Kennedy stoppings serving as seals.

From Mr. Duran's statements, the witness believed miners were working in an explosive gas area. Mr. Duran told him the company had dropped the ventilation curtains.

After the order was issued on 2d South, MSHA allowed the company to build permanent seals. In 1st Right the seals were built; after the seals were completed in 1st Right, the methane was no longer in the explosive range.

Stoppings in 2d South were constructed in a poor position since they were close to the entries. The ribs themselves were crushed and rolled and there was concern about the integrity of the seals. Logically, there wasn't a perfect solution. The order of withdrawal issued on February 13 is the same order terminated February 28.

The imminent danger order was modified and left in effect as a control measure. When the order was issued on 2d South, the mine was closed. No one was allowed to return until the order was modified.

On acceptance of the company plan, the order was modified and the company was allowed to enter 2d South and build the seals. The company was also permitted to check the water accumulations and methane concentrations in the area.

The plan to construct the seals indicated an ongoing effort to provide a safe working environment. The ten-point plan that was approved by MSHA provided that certified people would monitor the area; also, non-sparking tools would be used.

The chain of command, from MSHA's viewpoint, was the office of District Manager John DeMichiei to Sub-District Manager Joe Pavlovich to the MSHA field office and then to the three regular MSHA inspectors.

WILLIAM REITZE, an MSHA mining engineer, has been with MSHA for three years. He is familiar with the Golden Eagle Mine and has been in the mine on three occasions. Mr. Reitze identified the ventilation plan for the mine; he has reviewed the plan in its present form (Exhibit S-8).

He indicated that Kennedy stoppings were a form of ventilation control but do not constitute a seal. All areas of a mine must be ventilated or sealed.

In this mine, Kennedy stoppings were across the entries in both areas. This would indicate the areas were not being ventilated. There was no way for air to make a loop through the area.

Permanent seals are constructed of 8-inch by 8-inch by 16-inch concrete blocks. The blocks for the seal must be 16 inches thick with a surveillance tube and water tap. If the seals are in place, methane can build up beyond the explosive range. The CO₂ will also increase in the atmosphere. It is impossible to build a perfect seal. Seals normally leak.

One method is to put in a temporary seal and then construct a permanent seal. The permanent seals are cut into the rib floor. The concrete blocks are then sealed with mortar.

The mine requires explosion-proof seals. A Kennedy stopping is not explosion-proof. A Kennedy stopping is eight inches thick but stoppings are not built to hold an explosion. In one of the entries here, it took four hours to install an explosion-proof seal. It is a good mining practice to monitor an atmosphere behind the seals as it is necessary to know the extent of methane build-up, depletion of oxygen, etc.

There can be variations of methane concentrations behind the Kennedy seal, as well as behind a permanent seal.

The mine maintained two areas which were not ventilated and permanent seals were not installed.

A map is part of the ventilation plan. It is shown in Exhibit S-8.

Exhibit S-9 shows the 2d South area where the seals are constructed (left of center of map shown in Exhibit S-9). On Exhibit S-9 the triple lines indicate a seal. The initials "SM" mean "Steve Madson." He indicated where the seals were to be constructed. Madson drew the seals on the company map and initialed the map. The map is part of the approved plan.

The ventilation plan requires methods to be used for the concrete explosion-proof seals. Exhibit S-10 is part of the ventilation plan. It contains estimated construction dates.

Seals are to be constructed and seals should go up to the ventilation stop.

WFC's Evidence

DAVID HUEY, Wyoming Fuel's Manager of Operations, is a person experienced in mining. The company employs 132 hourly miners and has 26 underground management personnel. The mine is 450 feet deep and a strata of shale overhangs the workings.

Exhibit C-2 is the roof control plan; a page of the plan is a lithologic survey prepared by the company's chief engineer.

The mine liberates in excess of five million cubic feet of methane in a 24-hour period; as a result, the company has a weekly inspection as mandated by § 103(i) of the Act.

A 14-foot diameter intake shaft in the return shaft pulls 500,000 CFM. Exhibits C-3 and C-4 show the abandoned area.

The Kennedy stoppings are marked with three vertical slash marks on the exhibits.

The company increases ventilation to handle the methane liberated by the mine. Certain areas are sealed because of the amount of methane liberated. The Kennedy stopping is used to shut off air; it is not a seal.

There has been no mining in the 2d South area since 1985 because of floor heave and maintenance problems. The concrete block stoppings were broken.

If a stopping is crushed out, the air will short-circuit and not go back to the end of the panel.

Heaving problems in 2d South were present since Mr. Huey began his employment with the company. The company has also encountered black damp (CO₂). The section is 2500 feet long. Black damp was encountered at 2,000 feet. Brattice was installed where the Kennedy stoppings had crushed out. This did not solve the problem, which has been ongoing since August 18, 1989. The company also blocked off entries with Kennedys. The Kennedys prevent access to an area. The company decided to seal 2d South when they installed Kennedy stoppings in January 1990. The company did not continue to work in 2d South after the Kennedy stoppings were installed. However, foremen walked the area in pairs in the event brattice needed to be moved.

Kennedys were installed in the latter part of January 1990 to keep the miners out. There was positive pressure maintained on the Kennedy stoppings. The purpose was to keep miners out of the areas where there was positive pressure on the stoppings. The 37,000 plus CFM airflow against the Kennedy stoppings would dilute any methane. The loop of air was drawn on Exhibit C-4; the arrows show the airflow before the Kennedy stoppings were installed.

The heave of the floor will break a Kennedy stopping. Kennedy stoppings were installed before an area was sealed. The ventilation plans permit Kennedy stoppings.

After putting in the stoppings the company would next, in sequence, install seals at the mouth of 2d South.

The material for installing the seals had been loaded and moved into position by the track. This was an ongoing process. The material would be transported by locomotive. The route is by a rope slope and then by cable car. On one trip the company could put in material for a seal but the material itself goes on a locomotive to the track end. The supplies are then hand-carried to the six sites. One man could carry one block from the track. It is about 600 feet. If the seals are on the outside then there is a possible travel distance of 900 feet from the track end to the seals. The mortar was contained in 90-pound bags.

Mr. Huey had a conversation with MSHA about the sealing of 2d South. The company planned to seal 2d South. MSHA's Archie Vigil was supportive of the idea.

Witness Huey was informed at home of the imminent danger order in 2d South. At that time he was advised that Inspector Jordan had ordered the miners withdrawn. The subsequent discussion with MSHA representatives took place at the mine office.

The outcome was to erect permanent seals which the company had already been set out to do. Mr. Huey did not agree with the imminent danger order because there was no imminent danger. There was a lot of black damp but there were no ignition sources in the area. The inspector said there was a possibility of a roof fall. However, the company uses resin-grounded roof bolts. There wouldn't be a roof fall behind the Kennedy stoppings.

Belt structures could not be ignition sources. MSHA also claimed that a roof fall could strike a rail and cause an ignition. They also claimed that the methane behind the Kennedy stoppings was in the explosive range. Mr. Huey would expect to find methane behind the Kennedy stoppings.

He was aware of two roof falls in 2d South in an area behind the Kennedy stoppings. This had occurred at some previous time.

The 1st Right area involved the imminent danger order. 1st Right and 2d Right were developed by longwall panel. The company encountered a fault in 2d Right. The fault resulted in excessive water (600 gallons per minute and excessive methane).

The company pumped out the water reducing the methane and also put up a seal. Mr. Huey was assisted by MSHA on arranging the temporary seals. Positive air pressure was used on the seals. They had a difficult time keeping the methane concentration below 2 percent. The company installed Kennedy stoppings across three entries but applied positive pressure to them. (The air-flow is shown in blue on Exhibits C-5). When the company reached 1st Right at the junction of 3d North, it could not get the methane concentration below 3 percent, so they took in fresh air and decided to seal 1st Right.

They also erected three Kennedy stoppings and started putting in explosion-proof seals. This started the last part of 1988. An MSHA inspector assisted them in this effort. The readings were taken at the face of the shields and no imminent danger orders were issued during the monitoring of the seals.

Methane to be explosive must be in the 5- to 15-percent range. The inspector knew Kennedy stoppings were located in 2d Right.

Permanent seals in 1st Right were put up in the latter part of 1988 and there were tubes to monitor behind the seals at the mouth of 2d Right.

In 1st Right the excessive water was permitted to flood. Then there was a low place from crosscut 7 through crosscut 9 (marked dip on Exhibit C-5.) Methane was also bubbling through the water. As a result of the water and methane, the company had to retreat to crosscut 11. Water was flowing at 20 gallons per minute.

In December 1988, the company decided to seal 1st Right and erect Kennedy stoppings. MSHA was supportive of this plan. The Kennedy stoppings were to seal off the methane. Without the stoppings it would not be necessary to keep miners in the area. They did not use oxygen apparatus to assist the miners in erecting the stoppings. It would have been unsafe to expose anyone to this type of atmosphere.

It was decided to put Kennedy stoppings and room curtains at 1st Right and start erecting the seals.

Also a bore hole from the surface was drilled. The purpose of the bore hole was to vent off any pressures in the area. The bore hole was installed in the summer of 1988. The bore hole took care of the methane but it would not enter 1st Right because of the fault line.

In February 1989, the company did not intend to install Kennedy stoppings as permanent seals. There was positive pressure on the seals as a result of 89,000 CFM. In 1st Right air was directed into the Kennedy stopping with line brattice. If there was no positive pressure, methane would go in the main return. Kennedy stoppings remained until February 16, 1990.

MSHA makes quarterly AAA inspections. The 1st Right area is one of the areas in the inspection book. In addition, a 103(g) complaint was made by a miners' representative. He claimed the company was not firebossing the 1st Right area. The company examiner would have to check the methane. It was not above 2 percent. An examiner would also examine Kennedy stoppings for methane. On February 16, MSHA said the company could not use the Kennedy stoppings as a seal. Mr. Huey said that they were not being used as a seal. MSHA did not advise them of any methane readings by the Kennedy stoppings.

Mr. Huey met Inspector Jordan on February 17. Inspector Jordan said that there was 10 percent methane concentration behind the No. 3 permanent seal in 1st Right.

In order to terminate the order, the company was required to build seals (as shown on Exhibit C-6). The seals had to be built by the 17th.

Mr. Huey was told this would be dangerous because of a possible roof fall at 1st Right; he did not agree there was any imminent danger.

The inspector said Kennedy stoppings could cause an ignition due to a spark, but this wasn't possible since most of this area was flooded. Any roof fall would drop into the flooded area.

Concerning the termination order in 1st Right, Mr. Huey took readings and knew that the methane concentration there was substantial. Inspector Jordan said it was a 10 percent concentration. Mr. Huey got a detector and obtained a reading of 80 percent methane. He had shut down the bore hole to increase the methane concentration.

"Imminent danger" means immediate danger to miners in a coal mine. Imminent danger can be bad roof, bad air, methane concentrations, black damp, and other conditions.

Concerning 1st Right, Mr. Huey did not believe there was imminent danger. The area was flooded and in 1st Right he had seen flooding for over a year. However, part of it was not flooded. Roof falls are not a source of spark because the company uses resin bolts. Also, at 1st Right more than ten feet of sandstone would have to fall before it could be a source of ignition.

There was no condition of imminent danger because there were no ignition sources or trolley wires.

It is not a safe mining practice to use Kennedy stoppings as permanent seals. Kennedy stoppings are in 1st Right to direct ventilation. It takes three hours to install Kennedy stoppings, while a permanent seal can be built in about 24 hours. There were no permanent seals in the 1st Right area.

The company decided to put up seals in the latter part of February 1989. This was a year before the inspection.

The seals were installed after the MSHA order was issued. The MSHA manager discussed seals in 1st Right on February 13 and 14. The company decided to put in seals because operations were shut down in 2d South. The company maintains three shifts at Golden Eagle. All of these are production shifts.

On February 14, six miners and the foreman built the seals. They started on Tuesday and finished three seals by Saturday afternoon.

The Kennedy stoppings directed the course of the air. An excessive amount of time did not elapse between the time the Kennedys were installed and the time the permanent seals were constructed. The Kennedy stoppings cut off access and ventilation to a given area.

The stoppings are printed on the mine map as two lines; the seals are printed on the map as three lines.

If an area is not ventilated it could be sealed with explosion proof seals because of possible explosions inby the seals.

Kennedy stoppings are not explosion proof. There was heaving in the 2d South area and Kennedy stoppings can be damaged by heave as can any kind of other stopping or seal.

The company planned to put in permanent seals when they got to it. There was some material in the area on February 13 but Mr. Huey did not know how much. There was not enough material in the area to build one seal. He didn't tell MSHA when the area would be sealed. The Kennedy stoppings were initially in 2d Right.

They worked on the permanent seals in 2d Right when they could get to it. At crosscut 13 the seals were done a lot quicker. Mr. Huey considered crosscut 13 to be an emergency situation.

In 2d South, on February 13, there was a carload of concrete blocks and mortar on the tract to be used to build permanent seals.

The witness did not believe an imminent danger condition existed at 2d South since there was no ignition source. There were roof mats in the area.

The witness knew of two roof falls by crosscut 20 and six roof falls in 2d South.

There is still disconnected track and trolley wire in the area. It took three shifts working five days to construct the seals. The material for the permanent seals was in the section before the Kennedy stoppings were installed. It was a management decision to install the Kennedy stoppings. If the company reconnected the track from the area marked "track end," it would be necessary to knock out two stoppings. (Ex. C-4). The track had been disconnected for a year.

As Manager of Operations, the witness reports to the company Vice President Charles McGlothlin; the mine foreman reports to the witness.

The witness did not discuss Kennedy stoppings in 2d South with Mr. McGlothlin. Kennedy stoppings cannot be used as a seal. The Kennedy stoppings were two to three feet from the seals.

The Company did not have a definite date to install seals. The first step was to install the Kennedy stoppings. The start date was when the Kennedy stoppings were erected; but the company had not begun to install the seals.

After the 107(a) order was issued on 2d South, the company discussed removing the Kennedy stoppings and installing seals in their place. However, the witness did not want to do that because you could only take down one stopping. It was unsafe to remove the Kennedy stoppings because of the methane mixture behind the Kennedy seals. The gas migrating from where the stoppings would be removed could be harmful.

Before the order was issued, the witness understood that MSHA accepted Kennedy stoppings as seals. This understanding was based on what MSHA had observed in the past.

Kennedy stoppings are designated on the map in the mine office; the area was also shown as "not ventilated."

The company has received a citation for curtains used as ventilation controls and it has also been cited for lack of rock dust. In the witness's previous job in West Virginia, the company did not use seals. Abandoned areas were not sealed.

The order was issued on 2d South because of a miner's complaint. The miner was John Garcia. He identified himself to the witness as the person who filed the complaint. He filed the complaint because the company was not letting him serve as a fireboss.

Once the Kennedy stoppings were erected, the company made weekly examinations at the stoppings; some of these were recorded in the book.

Certified firebosses could danger off any area. Firebosses are a mix of hourly and salaried people.

When the 107(a) order was issued at 2d South, the witness understood the company could work on 1st Right notwithstanding the order. MSHA's representative Mel Shively supported this idea and concurred with the company's view.

There was a cave-in to the sandstone at the east end of the mine in 1987.

It was ventilated at 1st Right after the Kennedy stoppings were installed because the company had a bore hole drilled into the area.

The diagram (Exhibit C-2) showing the lithology was made as a result of the bore hole samples. Some portions contained sandstone but others did not. The circled area line shows the return aircourse.

An explosion in 2d South would probably propagate into the mine. The witness was not aware when any sandstone had fallen onto the mine floor.

JACK FELTAGER is a construction foreman for Golden Eagle. He indicated the track and the trolley wire had been cut at the point marked "track end." The track was also cut outby the Kennedy stoppings for a distance of about 15 feet. The trolley wires were also cut at approximately the same location. By "cut" Feltager means separated and de-energized. Sections of the track were also removed. The cut was made in order to install stoppings.

The witness has built permanent seals with material that was present at the site. One seal could have been constructed with the material present but additional mortar mix would have been needed. The witness was partly involved in the building of the seals and it was necessary to hand-carry mortar blocks to the point of construction. One or two overcasts along the way were difficult to enter; it was also necessary to pass the 30-pound blocks through some manddoors which are $2\frac{1}{2}$ x $2\frac{1}{2}$ feet wide. They also used a wheelbarrow because the area was too restricted to use larger equipment. Forty miners were involved on Mr. Feltager's shift to install the seals. It took five days to construct them.

On February 13, in 1st Right, there were materials at the No. 2 entry to install seals. There were about 80 blocks and 30 to 40 bags of mortar. With this amount of material you could install two rows of a permanent seal.

When installing seals in 2d South the men were two to three feet from the Kennedy stoppings. The company had three foremen monitoring the Kennedy stoppings. MSHA representatives were also monitoring the work in the area.

No work was started with the permanent seals in 1st Right on February 13, 1980.

The witness receives his orders from the general plant foreman. No definite time had been set to begin the installation of the permanent seals. They were going to put Kennedy stoppings in, then do the seals "when we can." The witness has two crews who construct seals. Mr. Giacomo, of the company safety department, told the witness that the seals were to be built in 1st Right. On the 14th, Mel Shively asked the witness if they were working on the 1st Right seals. He replied affirmatively. They were starting the seal in the No. 3 entry and they had been at the work for seven hours.

The witness was familiar with the installation of seals. The Kennedy stoppings were used for ventilation control. When construction began at 1st Right the witness was aware of the 107(a) order and he understood the company could only work in the 2d South seam.

When he entered 2d South on February 13 with Mr. Duran and Mr. Pavlovich, the witness learned the inspector would issue the 107(a) order. When he realized MSHA was going to issue such an order he contacted other people in the mine. The witness was not aware of any imminent danger situation.

He remained in the mine ten minutes after he was told of the imminent danger.

DONALD L. GIACOMO, a member of the company's safety department, renders assistance to all departments. He has been in the mining business 18 years. He was familiar with the MX 240 (see Exhibit C-1), which is the instruction manual.

On February 13, 1990, MSHA issued the imminent danger order. The inspectors arrived at the mine about 6:30 a.m. and the withdrawal began between 10:30 and 11 a.m. The company did not receive a written copy of the order until after 5 p.m.

On February 14, it was decided seals should be built on 1st Right and he knew that they should take corrective action.

He was aware MSHA knew about the Kennedy seals in the area. At the close-out conference MSHA inspector Al Shively asked when the work would be done on the seals. About 2 to 2:30 p.m. on February 14, Mr. Giacomo was approached by Mr. Shively who asked what they were doing in 1st Right. When they replied they were building seals, he said, "Good." That was what he wanted to hear. The imminent danger order was issued on 1st Right on February 16.

Under the 107(a) order the mine could be checked for hazardous conditions, but he did not discuss the possibility of going to 1st Right to construct the seals. The witness thought that if there was imminent danger he would construct the seals. When he arrived on 2d South on February 14, he did not consider that there was an imminent danger situation.

In the main return outby the Kennedy stoppings the air was moving in excess of 39,000 CFM and the witness could not detect methane in excess of 2 percent. A Kennedy stopping is not explosion proof.

The witness was not involved in the decision to put Kennedy stoppings in 1st Right. If there was no explosive mixture outby the stoppings, there was no urgency in erecting the permanent seals.

Nothing in the standards tells the company that the seals should be put in place whenever "practical."

There were no dangerous levels of methane outby the Kennedy stoppings. Hence, it was not necessary to construct permanent seals. The Kennedy stoppings blocked the access of miners in the area.

The witness was not involved in the decision as to when 2d South and 1st Right could be permanently sealed. Such a decision is made by Mr. Salazar, the general mine foreman.

The witness decided to install seals on February 14. Mr. Feltager was aware of the decision and by that time they had been advised of MSHA's order. At the Golden Eagle mine, MSHA inspectors write their orders after they come out of the mine. The time on the imminent danger order was 11 a.m. The witness physically received the order at about 5 to 5:30 p.m.

Before February 14, MSHA's Mr. Shively was aware of the Kennedy stoppings in 1st Right and before that date he asked when they would start building the seals. On February 14, Mr. Shively asked the witness what they were doing in 1st Right. The witness took that to mean "Are you building the seals in 1st Right today?" His response was that we were building the seals; Mr. Shively replied he was glad to hear that.

FRANK W. BURKO, a safety supervisor at the Golden Eagle Mine, accompanied Inspector Duran on February 16, 1990.

The purpose of the line brattice is to ventilate the stoppings. The inspector took readings right by the seal. Mr. Burko went to the No. 3 and No. 2 entries where the brattice had been drawn back to the ribline. Mr. Duran made several checks in the area of the No. 2 entry.

Mr. Burko said brattice should be brought in to help with the ventilation. Mr. Duran said he wanted to check. The inspector was checking two to four inches away from the stopping. He should have been a further distance back from the stopping.

In the No. 1 entry the parties were accompanied by a mine representative. The ventilation was disrupted by pulling the curtain back. Mr. Duran said he would have to issue a 107(a) order.

On the night of the February 16, the witness traveled with Mr. Phelps to 1st Right. The construction of the seals was continuing. He and Mr. Phelps looked at the seals in 2d right. Mr. Shively said that there was a continuing accumulation of water.

Mr. Burko did not remember his methane readings but they were not taken a foot from the roof or ribs. When in the No. 2 entry, he didn't hear Mr. Duran tell anyone to move the curtain. It took five minutes to take his readings. Mr. Duran did not explain his reasons and he wanted to keep the ventilation functioning.

The Kennedy stopping in the No. 2 entry was 10 to 12 feet back into the rib line. Mr. Burko did not travel to 2d South on the day the imminent danger order was issued.

Concerning the seals under construction: only two rows of 30 inches were needed to complete one of the seals. One or two rows had been started on the No. 2 seal.

In the No. 1 entry the curtain was pulled back but that would slow ventilation.

Apparently Mr. Burko got the same reading as Mr. Duran. The men took readings in the main return and there may have been a difference between the Burko and Duran measurements of methane.

CHARLES W. MCGLOTHLIN, JR., Vice President and General Manager of the Golden Eagle Mine, reports to Chuck Batty, CEO. Mr. McGlothlin has had 28 years in the mining industry and is experienced in that field.

Mr. McGlothlin was aware of the order of withdrawal issued February 13, 1990. He discussed the situation with subordinates in the mine and investigated the facts. The company further tried to develop a plan to satisfy MSHA. He met with MSHA representatives on February 13 to discuss ventilation in general and to develop a plan to abate the condition. Messrs. Huey, Phelps, Paplovich, Duran, and Jordan were present at the meeting.

Mr. McGlothlin challenged MSHA's conclusion that this was a condition of imminent danger. MSHA believed that it was an imminent danger situation due to the methane behind the Kennedy stoppings. Mr. McGlothlin disagreed because there was no ignition source behind the Kennedy stoppings.

The company's plan was to build permanent seals at 2d South but he was not sure when the construction would be completed.

On Thursday, February 15, about 5 p.m., he had a telephone conversation with MSHA's Mr. Phelps, of which he made notes. In the conversation, Mr. Phelps indicated that the new District 9 (MSHA) policy was that a 107(a) order would not be terminated. Mr. Phelps had been made aware of that policy. He believed that the company would know about it sooner or later. MSHA intended to modify the order to allow sampling. Mr. Phelps learned that the saturation inspection occurred because of an explosion at Pyro, Kentucky. There was no discussion about the Kennedy seals over the telephone.

On February 16 about 8:30 a.m., Mr. McGlothlin contacted Jerry Taylor at MSHA's office. He understood that Mr. Taylor was the No. 2 ranking official. On the telephone Mr. Taylor confirmed Mr. DeMichiei's policy; namely, no one could be underground while an atmosphere behind the seals was in an explosive range.

At his request Mr. DeMichiei returned Mr. McGlothlin's call about 9:30 a.m. He was aware the atmosphere behind the Kennedy stoppings was in the explosive range. Therefore, this constituted a situation of "imminent danger". Mr. McGlothlin told Mr. DeMichiei that the roof at the mine did not contain an ignition source. Mr. DeMichiei replied that they had attended a meeting and the subject had been discussed at a District Managers' conference. The managers were unanimous in their view. Imminent danger existed because of the possibility of a roof fall. Mr. McGlothlin was distressed because he felt MSHA regulations should not be made in this fashion; i.e., by a meeting of MSHA's managers.

Mr. DeMichiei said that he would forward a report from the Bureau of Mines to confirm his position. This report had not been received as of the date of the hearing.

After the talk with Mr. DeMichiei there was further conversation with him about the history of the roof falls at the mine. Mr. DeMichiei suggested a meeting on Tuesday (Monday was a Federal holiday). Mr. McGlothlin passed the information along to the Safety Department. Mr. McGlothlin made notes of the statements by Mr. DeMichiei.

Mr. McGlothlin has been a mine foreman, shift foreman, and an hourly worker. He was familiar with methane and with the sealing of abandoned areas. In his opinion, there was no ignition source in 2d South but he would agree that would be a situation of imminent danger if an ignition source existed.

At the time of the violation, Mr. McGlothlin had not read the order but he understood they could build seals in 2d Right. Inspector Shively recommended the time be used to build such seals. This information came from one of the company representatives, but Mr. McGlothlin did not remember who had told him about this facet of the case. The person who told him had first-hand information.

Mr. McGlothlin had seen the language in the order about the maintenance, inspecting, and pumping. He did not know who authorized the work. He was aware that Kennedy stoppings were being used to cut off circulation in the mine. They discussed the plan for sealing the areas in the mine.

Kennedy stoppings are an effective method to block off areas while permanent seals are being constructed. When seals are to be installed, it is a matter that is site specific. The seals had not been installed in over a year but the company had good positive pressure. The area was stable and under control. Seals are worked in with the regular construction schedule.

If the company experiences heaving, unstable roof, or methane over 2 percent in the return air, permanent seals should be installed.

On 2d South, no date had been established to put in seals. The Golden Eagle Mine can cut off ventilation and install permanent seals when they get around to it. This has been an accepted work practice. Mr. McGlothlin could not say for sure there was no ignition source behind the Kennedy stoppings. The company's concern was black damp migrating out into the return. A roof fall is not a possible source of ignition in an abandoned area.

There could have been an explosive methane mixture behind the seal. The company was concerned about the type of readings being done here by MSHA and there are many indications of improper measurements. Also, wrong instruments were used, while some instruments were used beyond their limits. Mr. McGlothlin could not imagine any ignition source in 2d South or 1st Right.

DONALD W. MITCHELL, an expert witness and a person experienced in mining, testified at length. The witness's expertise is developed in his testimony and also set forth in Exhibit C-8. The Mitchell-Barrett seal was developed as a result of a memorandum he wrote.

Methane can be ignited either by a thermal factor of approximately 1800 degrees Fahrenheit or by incendivity. The latter are

sources other than heat such as sparks, arcing, and electrical current. Some sparks are not incandive, that is, they are not capable of igniting a methane/air mixture.

The witness had been asked to review the facts known in the instant case and render his opinion. He was contacted after February 13, 1990. In connection with the rendering of his opinion, he reviewed maps, the roof control plan, ventilation plan, pressure differentials across the seals, and a ventilation study by Boyd and Company for the Golden Eagle Mine. He also visited the mine the week before he testified.

Methane is controlled by ventilation and a survey in September 1989 by Boyd and Company was very useful. (John T. Boyd is a consulting firm for the coal mine industry.)

Mr. Mitchell used a computer program which is the same program used by MSHA concerning the effect of gas, black damp, and methane.

Using the Boyd data and the flow of air, he added 1st and 2d Right to the network of computer data. The Boyd data did not include 1st and 2d Right as points in the network. He also added the bore holes from the mine to the surface which were shown in 1st Right and 2d Right. In addition, the Kennedy stoppings were calculated into the network but no other modifications were made to the Boyd data.

Seals are notorious leakers. They do not prevent an interchange of gas between areas and even the best seal leaks 100 to 150 cubic feet per minute per one inch of water gauge differential. However, a typical leakage is 100 to 1000 on the same scale.

The witness had been present during the proceedings in the case.

When Kennedy stoppings are in place, the area is being ventilated in certain respects. Ventilation requires a loop and there were three such air loops. They were as follows: (1) the No. 1 entry of 1st Right to the bore hole; (2) the No. 1 Right entry through the Kennedy stopping to the No. 3 entry before and after the seal construction began; and (3) the No. 1 entry to No. 2 entry. The bore hole constituted part of the loop.

The witness's study, without the Kennedy stoppings in place, indicate a concentration of methane at 1st Right of 5 percent. In the No. 7 entry the methane was 4.5 percent. Methane was originating at the face of 1st Right.

There is a problem of 4.5 percent methane concentration in the No. 7 return. Methane should not exceed a concentration of 1.5 percent.

With Kennedy stoppings in place and with a fly curtain, the methane concentration at the face of 1st Right would be 4 percent.

In the return air in the No. 7 entry there would be 1.5 percent concentration of methane. With a Kennedy stopping and fly curtain in place, the bore hole would become a major part of the ventilation loop. A fly curtain will increase the leaking rate from No. 7 entry into 1st Right.

Any methane behind the Kennedy stopping would move primarily to the bore hole, but some would leak through the right side of the Kennedy stopping into 3 North.

Methane was being liberated by 1st Right and there was methane behind the Kennedy stoppings. There was also an explosive mixture of such methane behind the Kennedy stoppings and a mixture could be as high as 100 percent. However, if there was a 25 percent concentration, then this was an explosive mixture. The witness would expect an explosive mixture of methane behind the Kennedy stoppings at some point in time. When the inspector measured, there would have been different levels of methane behind the stopping itself.

The test methods used by the MSHA inspectors were inadequate. The resulting samples tend to be on the low side as to combustibility. The inspector took samples at one of the Kennedy stoppings. There was a major leakage, which would be a point of greatest leakage.

If Mitchell used the inspector's procedure, he wouldn't have been able to determine the air and gas mixture on the inby side of the stoppings.

The inspector was monitoring the atmosphere, but it may not have all been behind the Kennedy stoppings.

You could end up with 1000 different analyses. If a person wanted to learn an air-gas mixture by the Kennedy stoppings he should take samples at the bore hole. A sample taken at any other place would not be accurate.

If a reading at the bore hole was between 5- to 15-percent, the first reaction of the witness would be to prevent anyone from entering the area.

If methane concentration is above 15 percent (above 20 percent asphyxiation can be expected), then no one should enter the area.

Mr. Mitchell made an in-depth study and concluded there were no ignition sources in 1st Right. In connection with this, he examined four conductors and questioned people at the mine. (A conductor is something that could spark an ignition.) A conductor could be a pipe (including plastic), telephone lines, track, and trolley wires, or any wires in the explosive atmosphere.

The company followed standard procedures and made certain that all conductors had been disrupted. Usually one joint of track is removed for a distance of 30 feet. In addition, electrical wiring is cut, folded back, and taped.

Mr. Mitchell was concerned about friction ignition, that is, sandstone or quartz crystal in sandstone which have a potential for sparking. There is no such rock in the mine and, if there was, it wasn't at the place of the breakage. The area of concern in the roof fall would not exceed 30 feet divided by 4 or 7.5 feet. In that area you could develop strain, which would cause a spark.

There were no steel bolts in the area. Steel bolts are a sparking hazard. If, due to a roof fall a bolt is torn apart, it will generate sufficient sparking energy.

If a bolt bearing plate is made of silicone steel, or coated with aluminum paint, a spark could result if it struck sandstone on the floor.

A piece of aluminum rusty steel also creates energy sufficient to spark, if it is falling at 30 feet per second. Sandstone rock falling 30 feet is capable of creating a spark.

In this mine, the plates have no aluminum paint. However, an area of concern was aluminum pop cans. If a roof falls and strikes an aluminum can across a dry rusty area a spark can result. However, in this mine no such spark could occur because there is no probability that there was a dry aluminum can in the area.

Track is also a potential for sparking but there was no track or trolley wires behind the Kennedy stoppings. In addition, there was no belt structure in 1st Right. Mr. Mitchell did not inquire about the presence of trolley hangers.

There were mandoors in 1st Right but the area was flooded up to crosscut No. 7. Mandoors would not constitute an ignition source. Even though such doors are made of steel there is insufficient energy for sparking.

Based on his analysis of the area, Mr. Mitchell was satisfied that there was no ignition source in 1st Right behind the Kennedy stoppings. Based on his experience, it was not reasonable for an inspector to conclude that it was reasonably likely that death or serious injury could occur. Further, there was no basis to conclude that there was an imminent danger to the miners. If imminent danger existed, MSHA could have required inert gas to be pumped into the bore hole.

Given the manner in which the Kennedy stoppings were installed, it is not unusual for the company to have used such stoppings as it did.

Seals could not have been built by miners wearing self-contained apparatus. Working with such apparatus destroys a miner's peripheral vision. Miners should never be permitted to wear such equipment for longer than an hour. If the miners were building seals and the Kennedy stoppings had not been erected, the men would be exposed to an explosive concentration of methane, or they were in an area where they could be asphyxiated. (Exhibit C-9 illustrates testimony of the witness; the figures of Exhibit C-9 came from a computer model.)

Mr. Mitchell was familiar with 30 C.F.R. § 75.729. The regulation is statutory and it was written by Congress. Based on his knowledge of the Congressional intent and the related matters, the witness concluded that Section 75.329 does not apply to the Golden Eagle Mine. Basically, the regulation is related to 75.305(g)(2) which applied to mines in existence at the time it was enacted. The regulation applicable to the Golden Eagle Mine is contained in § 75.30 which Congress discussed.

When Mr. Mitchell was at the Golden Eagle Mine, he visited 2d South; he also heard the testimony of the witnesses regarding the section. He did not do a computer analysis in 2d South because he believed the area was non-ventilatable.

Black damp is an oxygen-deficient atmosphere. Pure black damp was officially called "choke damp."

In 2d South, Mr. Mitchell marked "Dip" on the map. It is shown with a green arrow. The dip is from the face to the open

area of the mine. One would anticipate that black damp would flow into West Main. The coal absorbs oxygen and also exhales carbon dioxide. Black damp can develop in ventilated areas of the mine.

Based on the information Mr. Mitchell received, 2d South could not be ventilated because the stopping had been crushed and the flow of air could not be regulated. Airflow would, to some degree, depend upon the elevation and temperature differentials. One would expect black damp in an area where the ventilation was disrupted. If an area cannot be examined due to black damp, then the company's action in placing Kennedy stoppings was a reasonable procedure. Further, a proper procedure was to examine the Kennedy stoppings weekly to see if they were not leaking excessively. Some leaking is all right. If the Kennedy stoppings were put in too deep, then the examiner would be entering a place where there is no ventilation. He could be asphyxiated. The best test against black damp is a plain safety lamp RMX 240 which would give a warning of black damp.

On February 13, 1990, MSHA inspectors took a reading and concluded there was an explosive mixture behind the Kennedy stoppings. This was not a valid conclusion because use of an aspirator is not likely to give a valid representation of an area which extends some 2000 feet behind the tube. In addition, the surveillance tube in this case was too short. It should have been 60- to 70-feet in by the seal or Kennedy stoppings. Kennedy stoppings are leaky and would have a constant flow of air back and forth (in by and out by the seals).

Mr. Mitchell recommended the operator extend the surveillance tubes at least to the third crosscut. Such a tube must be away from the area affected by the leakage in order to obtain a correct reading.

If Mr. Mitchell had taken samples as the inspector had done, he would be unable to render any judgment. The inspector did not wait for bottle sample results. (Exhibit S-6 was analyzed by the Mt. Hope Laboratory.) Mr. Mitchell gave no significance to the sample number A 2109 on Exhibit S-6 since it was inconsistent with the other samples. All samples must be tested for reliability created in this situation. The beeswax used to seal the bottles could have been contaminated.

There was probably an explosive as well as a non-explosive mixture behind the Kennedy stoppings on February 13. One would expect that there would be different air mixtures of methane behind the stoppings. The mere existence of a mixture is not

dangerous as the primary potential is asphyxiation. In Mr. Mitchell's opinion on February 13, 1990, there were no ignition sources in 2d South. In connection with this, he considered the thermal paint and conductional ignition.

In Mr. Mitchell's view, there were no means to conduct any energy into the 2d South section. In arriving at this conclusion, he examined the track, trolley wire, and belt structures. He arrived at the same analysis as previously in connection with soda pop cans.

He also considered thermal leakage and studied the lithology. The lithology (rock formation) was free of strata. It is normally associated with frictional ignition potential. In this situation there were wet surfaces. Portions of the bottom had heaved but other portions had not.

The kitchen was located at about Nos. 18 and 22 crosscut. It contained lots of black damp but no ignition source.

For methane to be ignited with oxygen, there must be at least a 12 percent concentration. Mr. Mitchell also concluded there were no ignition sources from the manddoors, roof mats, roof bolts, or metal bolt plates. Accordingly, there was no basis for the inspector to consider an imminent danger. Mr. Mitchell would also have advised against constructing the seals.

MSHA would not terminate the order until the methane behind the seals reached a non-explosive range. MSHA representatives said that there were arguments against this view. Even if the area was below the explosive range, there still could have been explosive concentrations in the area.

The Kennedy stoppings were made of metal, but these stoppings were free of silicone and light alloys which could cause a spark. The seals that would be eventually constructed should be hitched into the roof. If this is done, the worst thing that can happen is that the roof will break away and become ineffective. MSHA requires that seals be constructed with an angle iron on both sides of the seal.

After he visited the mine, Mr. Mitchell concluded that no imminent danger existed on the date the orders were issued. In arriving at his conclusion, he assumed the information he had was credible.

Bore hole flows can be ascertained with a reasonable degree of certainty. A Kennedy stopping and a seal are two different

things. The witness was familiar with the instrument used by the Boyd company and he understood that the Boyd company borrowed instruments from MSHA to do its survey. He expected the results he found.

Mr. Mitchell did not know if the Boyd survey measured methane concentrations.

The bore holes were closed by the operator on the 17th to assure MSHA that there would be methane concentrations above the explosive range.

If an atmosphere is unsafe, seals can be constructed after the atmosphere is stabilized.

Witness Mitchell conceded there was an explosive mixture behind the Kennedy stoppings.

2d South is an area of the mine that should have been sealed or ventilated. It was not ventilated on February 13.

Additional Evidence Presented by the Secretary

WILLIAM A. BRUCE (called by the Secretary), is the Chief of the Ventilation Division for MSHA. He has been so employed since June 1981. He is a graduate of the Colorado School of Mines and specialized in mine safety and health. He has also co-authored over 100 papers. At least half of them have dealt with ventilation and fragmentation of rock.

He has reviewed papers concerning fractional ignition and explosion-proof stoppings. Mr. Bruce identified Exhibit S-11 which outlines the explosive mixtures at which oxygen can explode. From Exhibit S-6 the sample taken by the inspector, A-2109, falls within the flammable area of methane. The methane concentration there was 6.19 percent.

Ignition sources can be caused by roof falls. An incendive spark is the same as an ignition source. Mr. Bruce has not visited the Golden Eagle Mine but he was present when the inspectors testified concerning the mine. He also reviewed the lithology as indicated in Exhibit C-2. He had not reviewed related lithology exhibits shown by Exhibit C-10 and C-11.

He also studied Golden Eagle rock samples. The samples had been obtained by Inspector Mel Shively and he secured them outby the seals in 2d South in entries 1 through 6. Samples were taken from the roof of the six entries. An analysis indicated that the rock samples were 19 percent quartz.

It was Mr. Bruce's opinion that the Kolanski and Neggi report was correct. It states ignition by sandstone on sandstone with a pressure of 50 pounds could easily produce an incendive spark. Kolanski and Neggi made their tests in an explosive chamber of methane.

A drop of 2.3 feet would produce a velocity of 3 feet per second.

In the Mr. Bruce's opinion on February 13 there could have been an ignition source from sandstone rubbing on sandstone. Also, a roof bolt seal falling at 32 feet a second would produce sparking.

Other ignition sources could be a roof fall of shale at a greater velocity or with a direct impact on aluminum or rusty steel.

At this particular mine the sandstone was above the shale but there are numerous sandstone channels in the area.

Mr. Bruce pointed out that each of the three lithological surveys appear quite different. They are now noted on Exhibits C-2, C-10, and C-11.

The map of 2d South does not show any sandstone but it could occur in 2d South and 1st Right.

Roof bolts in the 2d South were also a secondary source of ignition.

Mr. Bruce believed there was a potential source for explosion in 2d South on February 16. Accordingly, imminent danger existed in 2d South as well as in 1st Right on February 15, 1990.

Mr. Bruce had not heard that piezoelectric quartz had to be at least 30 percent of a rock fall in order to create an incendive spark. The ignition frequency in the Kolanski and Neggi report was 19 ignitions out of 119 efforts. The witness did not know what type of sandstone was used.

On Exhibit C-10, the sandstone was 42 feet above the Maxwell coal seam and on Exhibit C-11 the distance was 26½ feet to 33 feet.

Mr. Bruce agreed that the issue was a possibility rather than a probability. When MSHA Representative Mel Shively was in Denver, Mr. Bruce directly verified with him as to where he had obtained his samples at the Golden Eagle Mine.

JOSEPH W. PAVLOVICH, MSHA's Sub-district Manager in McAlister, Oklahoma, is responsible for enforcing the Mine Act over the mines in his jurisdiction. He has been so employed since August of 1989 and has worked for MSHA for 15 years. He is a person experienced in mining.

As part of his duty he has inspected the Golden Eagle Mine. An MSHA inspection began February 13, 1990. He arrived at the 2d South area the same date. Exhibit C-4 shows where the witness left the mantrap and walked into the 2d South area.

Inspector Jordan told Mr. Pavlovich that he had examined all six entries in the area and found Kennedy stoppings erected across each entry. He also stated that he found methane with a hand-held detector of about 1.5 to 1.7 percent outby the stoppings.

Mr. Pavlovich's first reaction was that an unventilated area of the mine had not been sealed. The mine liberates five to six million cubic feet of methane in a 24-hour period.

Mr. Pavlovich was involved in a decision to issue the imminent danger order in 2d South. The men walk the belt entry and there was a lot of the belt structure leading to the first stopping which had been cut. That is why Inspector Jordan took a methane reading near the face; he detected a 2.2 percent concentration. This indicated the methane had increased in the last hour or two. He had found 1.5 or 1.7 percent on his initial examination. If there was 2.2 percent, there would be more methane behind the stopping.

A further factor leading to the issuance of the imminent danger order occurred when they walked over to the far right-hand entry which the company calls No. 1. A vent pipe for the sample tube had been put through. The inspectors began to aspirate the line. The methane climbed 0 to 9 percent and he immediately removed the equipment to keep it from burning the sensing cell. This was tried on numerous occasions and continued to do the same thing. This indicated to Mr. Pavlovich that a concentration of at least 9 percent of methane existed behind the stopping. This would be a very dangerous concentration. Mr. Feltager stated the tube projected about 40 feet into the area. Mr. Pavlovich felt that they were getting a good representative sample. Bottle samples were also taken. Mr. Feltager stated that he thought that there was about 1600 feet of track left in the area. He wasn't sure about whether there was trolley wire. There was a load of belt structure and belt ropes and there may have been a rock dust pipe in the area. Also, roof

bolts, pans, and assorted metal objects could have been left behind during mining. This indicated to Mr. Pavlovich that there was a very good possibility of an ignition source. The occurrence of metal or the sparking of metal on metal or rock on metal could have ignited the methane.

Mr. Pavlovich also considered the possibility of a roof fall in 2d South. The area of the mine that they were dealing with was twenty-five crosscuts deep and six entries wide. If an ignition occurred, it would definitely propagate into the active areas of the mine, or disrupt enough of ventilation to harm the miners, or create conditions that would endanger the miners.

Mr. Pavlovich agrees that he was not exactly certain what he was dealing with behind 2d South. He determined there was a condition of imminent danger because of the large quantity of methane and the possibility of an ignition source.

Inspector Jordan had a CSE-102 methanometer. Inspector Duran normally carries a MX-240. The witness had given his MX-240 to another inspector because his equipment had failed. It is unusual that explosive mixtures of methane are found. Mr. Pavlovich did not consider that it was a choice to send an inspector back for a Riken methanometer. Mr. Pavlovich knew there was a quantity of methane behind the stoppings. He also knew there would be an explosive mixture. Methane that came out of the sampling tube indicated there was large quantities of methane. Accordingly, he was not going to send for the 100 percent (accurate) instrument with people working in the mine.

After finding these conditions, Messrs. Duran, Jordan, and Feltager discussed the issue of the amount of methane. Mr. Feltager told him of the metal objects he thought were back there. In Mr. Pavlovich's opinion, an explosion would endanger the lives of every man in the mine. Accordingly, a decision was made to remove everyone from the mine.

Mr. Pavlovich identified Exhibits C-2, C-10, and C-11 as being drawings as submitted by WFC and its approved roof control plan. After reviewing the lithology, no one could determine the rock composition precisely from the four pinpoint bore hole locations.

After the conversation with the superintendent, Mr. Pavlovich informed Mr. Feltager that it was necessary to systemically withdraw everyone from the mine. Mr. Feltager called every panel where miners were working and told them to proceed to the surface and to withdraw power. They were to travel as quickly as possible. The men also left the area quickly and evacuated the mine.

At the bathhouse there was a meeting with management representatives. At the company's request, the group traveled to the main office. At the meeting were Roland Phelps, Donalee Boatright, Don Jordan and the witness. On the company's side were Dave Huey, Rick Callor, and Donald Giacomo. Mr. McGlothlin did not participate in the full meeting.

Mr. Huey asked what his options were to get the mine back in operation. Mr. Pavlovich informed him that the area would either have to be ventilated adequately or sealed. Adequately means that all gases must be reduced to acceptable levels.

The Kennedy stoppings were not sealing anything. Such stoppings allow air to pass freely and they are not structurally as sound as a seal, nor are seals explosion proof. A large roof fall could blow them out. Mr. McGlothlin suggested that they ventilate the area. Mr. Huey said he could not ventilate the area because there were too many roof falls there. He also stated he was afraid to send anyone in there, nor would anyone volunteer to clip the Kennedy panels or the wires holding them together because of the fear of an explosion. The company's other option was to seal the area with explosion-proof bulkheads; that is, permanent seals.

Mr. Huey and Mr. Callor decided they would seal the area. MSHA requested the company prepare written safety precautions.

Mr. Pavlovich was informed by telephone on the morning of the 17th that the seals had been completed. Production was allowed to resume. From the day the order was issued the inspectors worked around the clock at the mine and continued to monitor the area. Mr. Pavlovich wanted to be sure the seals were functioning properly. After production was resumed MSHA continued to monitor the seals based on the operator's samples. The sampling was done on a two-hour basis at each of the sampling tubes. In the 1st Right section, ventilation had been cut off for the use of temporary stoppings for a period of more than a year.

Mr. Pavlovich indicated that there was a lot of methane being liberated. If there was any ventilation, it was not sufficient to dilute or render harmless the dangerous gases. In the view of Mr. Pavlovich it is not good practice to put stoppings in an area and not be working on the seals. To block off an area for a year ignores explosive mixtures of methane. This is not a good mining practice.

If Mr. Pavlovich was the operator he would have delivered materials to the site before the track was removed.

In each of the kitchen locations you would expect to find pop cans and aluminum foil. There are a succession of kitchens as the mining progresses.

Inspector Shively told Mr. Pavlovich that he was concerned over the fact that he did not recognize a condition of imminent danger. Most of Mr. Shively's inspections deal with electrical equipment in the face area. Mr. Shively did indicate to Jack Feltheimer some inquiry about when they were going to start building the seals. No particular date was given.

Prior to beginning construction of the permanent seals, the company submitted a copy of the plan to the MSHA's district manager. The plan set forth the precautions the operator would take and it also contained a series of drawings.

Mr. Pavlovich was informed when the 107(a) order was issued at the 1st Right section on February 16. Mr. Phelps told Mr. Pavlovich the circumstances under which the imminent danger order was issued.

Mr. Pavlovich felt a similar situation was present as they had found in 2d South. He had heard from Mr. Phelps the percentages of methane that Mr. Duran found out by the temporary stoppings and this was sufficient to justify an imminent danger particularly in view of the huge body of methane behind the stoppings. The fact that there was water in one of the areas did not change anything. In Mr. Pavlovich's experience the most common source of mine disasters in underground coal mines is the accumulation of methane in explosive quantities.

Additional Evidence Presented by Operator

DONALD W. MITCHELL (recalled): Mr. Mitchell does not agree with Mr. Bruce's testimony that the Mitchell Barrett seal could withstand a force of 20 PSI. It will withstand more than that. Extensive tests show that it will withstand forces up to 50 PSI.

Mr. Mitchell also disagrees with Mr. Bruce's testimony concerning the effect of water in an abandoned area preventing an ignition. In sum, water is the most effective quenching agent for incendive sparks.

Witness Mitchell identified Exhibit C-12 as a report of the U.S. Bureau of Mines entitled "Frictional Ignition Of Gas During A Roof Fall". The document was written by John Nagy and Edward Kawenski. The work in the report was done at the direction of the witness. The rock or sandstone tested was a light

gray quartzitic subjected to secondary recementation. This rock contained in excess of 90 percent quartz. Mr. Bruce testified that the Golden Eagle rock samples contained 19 percent piezo electric quartz. The samples on S-12 range from 16 to 19 percent quartz.

The potential for ignition in Golden Eagle Mine in 2d South and 1st Right sections is possible. The possibility is negligible.

A report prepared in the case shows that rock containing less than 30 percent quartz has a negligible incendive temperature potential (ITP). (See Exhibit C-13.) These studies indicate that the persons experimenting have never been able to obtain an incendive ignition of methane when the rock contained less than 30 percent quartz. The authors, instead of saying "no potential," merely state that the potential is "negligible."

Mr. Mitchell discussed at length the Belle Isle explosion involving a salt mine in Louisiana and the part he played in that investigation. He concluded that it was not valid to compare the Belle Isle explosion conditions at the Golden Eagle Mine. In the Golden Eagle Mine there was no shot firing nor any open electrical circuits in 2d South or 1st Right.

Mr. Mitchell does not agree with Mr. Bruce's testimony that any form of sandstone could create an incendive spark. This is because the potential for incendivity is a direct function of the quartz content. There is a high potential that the sandstone contains sufficient piezoelectric quartz and is subject to a sufficiently high strain as might be encountered in a longwall or in a pillaring operation.

The inspector thought from Mr. Duran's statements that miners were working in an explosive gas area. He didn't say check curtains had been taken down. Mr. Duran told him he didn't have ventilation curtains taken down.

Mr. Mitchell also disagreed with Mr. Bruce's statement that, any time a coal mine contains an explosive mixture of methane, there is a situation of imminent danger. His view was that, if this position was upheld, they would have to shut down almost every coal mine in the United States. There are explosive concentrations in almost every longwall operation.

The witness indicated that Exhibit C-14 is used throughout MSHA for evaluating the explosibility of an area. Exhibit C-14, a nose curve, can be used to determine the explosibility of any and all atmospheres in coal mines.

Golden Eagle Mine. The MSHA representatives and the witness agreed that the probable ignition source for the methane behind the seals in the NEBO and Quilan Mines was a lightning strike. In the Jim Walter No. 3 Mine there was a fire behind the seals.

Mr. Mitchell indicated with a blue magic marker the proper place, in his opinion, to take methane checks outby the Kennedy stoppings. Mr. Mitchell used the letters "GP" and marked the gas points. Mr. Mitchell indicated that there was a difference between gob fires and the situation at the Golden Eagle Mine in 2d South and 1st Right sections.

He treated the area behind the Kennedys as gob because it was not travelable. He would treat the area behind the seals as gob because it is not an area where a miner could travel safely.

The immediate roof in the 2d South area is basically shale. The industry's goal is to attempt to control the immediate roof when a seam is being mined.

Mr. Mitchell initiated the work involved in what became the Nagy and Kawenski report (Exhibit C-12.) He does not agree with the conclusions contained in the report.

Shale contains quartz but it is not necessarily piezoelectric quartz. One does not expect to find piezoelectric quartz in shale. One would anticipate it would be well below the 30 percent level in shale. In the 2 South and 1st Right sections any roof fall would consist of a soft wet and unconsolidated shale material. It generally crumbles, breaks, and falls out around the roof bolts. You would seldom have pieces larger than a head.

Discussion and Further Findings

The initial issue presented here is whether a condition of imminent danger existed. The evidence presents a credibility determination on such issue.

The withdrawal orders herein were issued under the authority of Section 107(a) of the Act, 30 U.S.C. § 817(a), which provides as follows:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists,

such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions of practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

The term "imminent danger" is found in the Federal Coal Mine Health and Safety Act of 1969 and amendments to the 1977 Act. The term means:

[T]he existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.
30 U.S.C. § 802(j).

Historically, the first tests for determining whether an imminent danger exists were set forth in Freeman Coal Mining Corp., 2 IBMA 197, 212 (1973), and Eastern Associated Coal Corp., 3 IBMA 128, 80. I.D. 400 (1973), aff'd, Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals et al., 491 F.2d 277 (4th Cir. 1974). In Eastern the Board of Mine Operations Appeals, formerly a division of the Interior Department's Office of Hearings and Appeals, herein "BMOA," held that:

... an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the affected area before the dangerous condition is eliminated; thus, the dangerous condition cannot be divorced from the normal work activity.
2 IBMA at 129.

In Freeman, the BMOA elaborated on its decision in Eastern and held that the word "reasonably" as used in the definition of imminent danger necessarily means that the test of imminence is objective and that the inspector's subjective opinion is not necessarily to be taken at face value. The Board also gave this test of "imminent danger":

... would a reasonable man, given a qualified inspector's education and experience, conclude that the facts indicate an impending accident or disaster, threatening to kill or to cause serious physical harm, likely to occur at any moment, but not necessarily immediately? The uncertainty must be of a nature that would induce a reasonable man to estimate that, if normal operations designed to extract coal in the disputed area proceeded, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger. (Emphasis added). 2 IBMA at 212.

The United States Court of Appeals for the Seventh Circuit in Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, et al., 504 F.2d 741 (1974), while quoting BMOA's definition of "imminent danger," went on to add its own:

An imminent threat is one which does not necessarily come to fruition but the reasonable likelihood that it may, particularly when the result could well be disastrous, is sufficient to make the impending threat virtually an immediate one. (Emphasis added). 504 F.2d at 745.

The Commission, in Pittsburg & Midway Coal Mining Company v. Secretary of Labor, 2 FMSHRC 787 (1980), also set a course for approaching imminent danger questions:

... we note that whether the question of imminent danger is decided with the "as probably as not" gloss upon the language of section 3(j), or with the language of section 3(j) alone, the outcome here would be the same. We therefore need not, and do not, adopt or in any way approve the "as probable as not" standard that the judge applied. With respect to cases that arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., we will examine anew the question of what conditions or practices constitute an imminent danger. (Emphasis added).
2 FMSHRC at 788.

In the enactment of the 1977 Act, the Senate Committee on Human Resources stated as follows:

The Committee disavows any notion that imminent danger can be defined in terms of a percentage of probability that an accident will happen; rather the concept of imminent danger requires an examination of the potential of the risk to cause serious physical harm at any time.

It is the Committee's view that the authority under this section is essential to the protection of miners and should be construed expansively by inspectors and the Commission. S. Rep. No. 95-181, 95th Cong., 1st Sess. _____ (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., Federal Mine Safety and Health Act of 1977 at 626 (1978).

The situation at the Golden Eagle Mine: MSHA inspectors asserted that an explosive mixture of methane concentrations existed in a large abandoned area behind the Kennedy stoppings. They further asserted that ignition sources also existed in the unventilated area. No permanent seals had been erected and any explosion would most likely migrate into the entire mine.

Given the foregoing scenario, it was claimed that a condition of imminent danger existed and an order was issued under Section 107(a). The inspectors further ordered the work force withdrawn.

The inspector's belief of the existence of "an impending accident or disaster must be measured in light of their actions. Freeman Coal Mining, supra, 2 IMBA at 212.

Before MSHA would take any action in terminating the order, it approved the operator's abatement plan. Specifically, on the same day the order was written, it was modified to permit 113 miners to construct permanent seals in close proximity (two to three feet) from the Kennedy stoppings. The construction took five days with the crew working 24 hours a day. MSHA inspectors were also present during the construction. (Tr. 221, 404, 462).

In addition, MSHA had not required that the atmosphere be stabilized with inert gas before miners were permitted to enter the First Right section. (Tr. 628).

MSHA's undisputed actions, as above, necessarily cause me to conclude that MSHA did not believe "an impending accident ... [was] likely to occur at any moment." Freeman, supra, 2 IMBA at 212. To like effect, see H.D. Entreprises, Ltd., 9 FMSHRC 1923 (1987) (Melick, J); Climax Molybdenum Co., 2 FMSHRC 2873 (1980) (Koutras, J).

I appreciate that MSHA directed the operator to monitor the area and to use non-sparking tools in the construction. But even such precautions would not protect the miners from the hazard perceived by MSHA, that is, an imminent explosion caused by an ignition source in an abandoned area.

WEST 90-112-R

In this case, I conclude that no condition of imminent danger, as defined in statutory and case law, existed in the mine. Accordingly, the contest of Order No. 2930784 should be sustained and the order should be vacated.

WEST 90-113-R

In this case, WFC contests Citation No. 2930785 issued by Inspector Jordan under Section 104(a) of the Act. The citation and the full text of the regulation, 30 C.F.R. § 329, are set forth on pages 3-5, supra.

The Secretary contends that the regulation, § 75,329-1 should be applied to mines that were opened after 1970. 2/

WFC argues that Section 75,329-1 does not apply to the Golden Eagle Mine.

In Ziegler Coal Company, LAKE 90-102-R (Sept. 21, 1990), Commission Judge George Koutras considered the identical arguments advanced in this case.

Section 75.329, which mirrors the statutory provision promulgated in § 303(z)(2) of the Coal Mine Health and Safety Act of 1969 ("1969 Act"), requires that

[o]n or before December 30, 1970, all areas from which pillars have been wholly or partially extracted and abandoned areas, as determined by the Secretary or his authorized representative, shall be ventilated ... or be sealed, as determined by the Secretary or his authorized representative.

Section 75.329-1 is a supplementary regulation promulgated to effect § 75.329's general directive. ^{3/} Section 75.329-1 provides, in part, as follows:

[a]ll areas of a coal mine which pillars have been wholly or partially extracted and abandoned areas shall be ventilated or sealed by December 30, 1970.

In determining whether § 75.329-1 applies to the Golden Eagle Mine, the regulation must be analyzed in light of its plain meaning and congressional intent. "[I]n statutory construction, the primary dispositive source of information is the wording of the statute itself." International Union, United Mine Workers of America v. Federal Mine Safety and Health Review Commission, 840 F.2d 77, 81 (D.C. Cir. 1988) [quoting Association of Bituminous Contractors v. Andrus, 581 F.2d 85, 861 (D.C. Cir. 1978)]. ^{4/} The plain meaning of the statutory language is conclusive unless a clear legislative intent to the contrary can be demonstrated. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984); United States Lines, Inc. v. Baldridge, 677 F.2d 940, 944 (D.C. Cir. 1982); Freeman United Coal Mining Co., 6 FMSHRC 1577, 1578 (1984).

^{3/} When the Secretary of the Interior promulgated the first set of regulations to implement the interim mandatory standards in Title III of the 1969 Act, he added "interpretations and supplementary regulations," 35 Fed. Reg. 5237 (Mar. 28, 1970), to particularize those statutory provisions. See, e.g., Jim Walter Resources, 7 FMSHRC 493, 495 (1985); Florence Mining Co., 5 FMSHRC 189, 190, 195 (1983) ("in order to clarify Congressional intent and to narrow the overly inclusive language of the statutory standard [§ 75.1405] the Secretary promulgated § 75.1405-1 ..."). Among those interpretive and supplementary regulations was § 75.329-1.

^{4/} See also Asarco, Inc. - Northwestern Mining Department v. Federal Mine Safety and Health Review Commission, 868 F.2d 1195 (10th Cir. 1989); Emery Mining Corp./Utah Power and Light Co., 10 FMSHRC at 1349. See Rubin v. United States, 449 U.S. 424, 430 (1981) (plain meaning governs statutory construction); Phelps Dodge Corp. v. Federal Mine Safety and Health Review Commission, 681 F.2d 1189, 1192-93 (9th Cir. 1982) (plain meaning governs construction of mine safety regulations).

According to its plain language, § 75.329-1's application is limited to areas which were pillared or abandoned prior to December 30, 1970, as evidenced by (1) the use of past tense ("have been ... extracted" and "abandoned") in conjunction with the time limitation of "by December 30, 1970" and (2) the directive of § 75.329-1(b). Congress's use of the past tense in § 303(z)(2) of the 1969 Act and the Secretary's use of the past tense of it in the supplementary § 75.329-1 demonstrate an intent to extend those requirements only to areas pillared or abandoned prior to December 30, 1970, and to require that only those areas be ventilated or sealed "by" that time.^{5/} "Congress could have phrased its requirement in language that looks to the [future] ..., but it did not choose this readily available option." Gwaltney of Smithfield, 484 U.S. at 57. "Moreover, Congress has demonstrated in yet other statutory provisions that it knows how to avoid this [retrospective implication by using language that targets wholly [prospective events]]." Id.; see, e.g., 30 C.F.R. § 75.326 ("[i]n any coal mine opened after March 30, 1970"); 30 C.F.R. § 75.330 ("[i]n the case of mines opened on or after March 30, 1970"); 30 C.F.R. § 75.500 ("[o]n or after March 30, 1971"); 30 C.F.R. § 75.501 ("[o]n or after March 30, 1974").^{6/}

Further, the directive of § 75.329-1(b) indicates that the intent of § 75.329-1(a) was to require that areas of mines in existence when the 1969 Act was passed by ventilated or sealed prior to December 30, 1970. Section 75.329-1(a) provided that if

^{5/} "By" means "[b]efore a certain time; ... not later than a certain time; or or before a certain time" Black's Law Dictionary 182 (5th ed. 1979). The dictionary is evidence of common usage, Puerto Rican Cement Co., 4 FMSHRC 997, 998 n.1 (1982) [citing 2A Sutherland, Statutes & Statutory Construction § 46.02 at 52 (4th ed. 1973)], to which adjudicatory bodies often refer to deciding matter of statutory construction. See Phelps Dodge Corp., 681 F.2d at 1192; Jim Walter Resources, Inc., 7 FMSHRC at 496.

^{6/} There are apparently no cases construing "on or before December 30, 1970, in § 75.329 or "by December 30, 1970" in § 75.329-1. Cf. C.F. & I. Steel Corp., 3 FMSHRC 99, 104 (1981) (Boltz, J) (the first sentence of § 75.326, which begins "[i]n any coal mine opened after March 30, 1970," does not apply to mines opened before March 30, 1970); Rushton Mining Co., Docket No. PITT 73-371-P, slip. op. at 22 (Jan. 31, 1975) (Cook, J) (same).

an area of a mine existing in 1969 could be ventilated, MSHA had to be notified and approve. Section 75.329-1(b) then required:

The request for permission to ventilate such areas must be submitted in time to allow consideration of the request, to obtain approval, and to permit the operator to install the ventilation system, or to install seals in the event the request to ventilate is denied, or or before December 30, 1970.

30 C.F.R. § 75.329-1(b) (emphasis added).

Indeed, the only interpretation of §§ 75.329 and 75.329-1 consistent with the statutory scheme is that those regulations require only areas already pillared or abandoned prior to December 30, 1970, to be ventilated or sealed. See Gwaltney of Smithfield, 484 U.S. at 59. Any other reading would make § 75.329-1 incomprehensible, violating the rule of construction that regulations must be interpreted "as a whole, in light of the overall statutory and regulatory scheme," Campeños Unidos v. United States Department of Labor, 803 F.2d 1063, 1069 (9th Cir. 1986), "to give them a harmonious, comprehensive meaning, giving effect ... to all provisions." McCuin v. Secretary of Health and Human Services, 817 F.2d 161, 168 (1st Cir. 1987) (citing Weinberger v. Hynson, 412 U.S. 609, 632-32 (1973)).

In 1969 Congress was concerned with methane accumulations in areas of mines that (1) were being pillared, (2) had been pillared or abandoned, or (3) would be pillared and abandoned. H.R. Rep. No. 91-563, 91st Cong., 1st Sess. 20-21, reprinted in House Committee on Education and Labor, 91st Cong., 2d Sess., Legislative History of the Coal Mine Health and Safety Act, 578-79 (Comm. Print 1970) ("Legislative History"). Congress enacted § 303(z) of the Act to deal with methane accumulations in the three situations described above:

1. Section 303(z)(1) requires operators to ventilate an area "[w]hile pillars are being extracted" from it. That section of the Act was recodified without amendment in 30 C.F.R. § 75.328.

2. Section 303(z)(2) required operators "within nine months after the operative date of this subchapter" (by December 30, 1970) to ventilate or seal all areas in existing mines which had been pillared or abandoned. That section was recodified without amendment in § 75.329, which was supplemented by § 75.329-1.

3. Section 303(z)(3) requires mines and sections of mines opened after the Act's effective date (March 30, 1970) to be designed so that abandoned sections can be sealed in accordance with an approved plan. That section became § 75.330 of the regulations.

Even assuming that the plain language in light of the statutory scheme, "Admit[ted] a smidgen of ambiguity sufficient to allow a look at the legislative history, here such history provides no basis for overturning ... the clear meaning of [the regulation]. International Union, United Mine Workers of America v. Mine Safety and Health Administration, No. 89-1563, slip op. at 4-6 (D.C. Cir. Apr. 13, 1990). The House Report and the Conference Report bolster the interpretation that § 75.329 (and the supplementary § 75.329-1) were intended to apply to mines and sections of mines already in existence when the 1969 Act became effective (giving those mines nine months to ventilate or seal), leaving § 75.330 to deal with methane in mines and sections of mines opened after the 1969 Act's effective date. 7/

The House Report distinguishes the requirements for existing mines from those for new mines as follows:

Seals and bulkheads shall be used to isolate in an explosion-proof manner all abandoned areas in existing mines. [§ 303(z)(2) of the Act, §§ 75.329, 75.329-1]. In addition, wherever possible, new areas of existing mines will be "sectionalized" with explosive-proof sealing when abandoned, that is isolated from active sections. [§ 303(z)(3) of the Act, § 75.330]. In new mines, opened after the operative date of the Act, it is intended that the mining system be such as to permit isolation by explosion-proof bulkheads of each section of a mine as it is abandoned. [§ 303(z)(3) of the Act, § 75.330].

7/ This construction of §§ 75.329 and 75.329-1 is also supported by witness Mitchell's testimony. (Tr. 643-645). Mr. Mitchell was Assistant Chairman of the Bureau of Mines Task Force responsible for drafting the regulations to implement the 1969 Act. (Tr. 641; Ex. C-8). He was given specific responsibility for drafting the regulations to be promulgated under § 303(z) of the Act. (Tr. 641). He confirmed that §§ 75.329 and 75.329-1 apply only to areas opened prior to December 30, 1970. (Tr. 643-645).

The same tripartite statutory scheme for regulating active pillar sections, areas already pillared or abandoned and, finally, areas to be pillared or abandoned is evident in the Conference Committee's explanation of how the three subparts of 303(z) of the Act work in tandem to regulate present, past, and future conditions:

The House amendment provided for the ventilation of areas of the mine while actively being pillared in a manner approved by the Secretary or his inspector. It also provided that, within 9 months after enactment, all mines which are or which have been abandoned must be sealed or ventilated, as determined by the Secretary or his inspector. The Secretary could permit a further time extension of 6 months. It described how adequate the ventilation should be and the method of sealing. In new mines and new working sections, a plan requiring sealing would be required.

* * * * *

The conference substitute was adopted after the House amendment.

Under this substitute, paragraph (1) of section 303(z) [§ 75.328] requires that areas which are actively being pillared must be ventilated in the manner otherwise prescribed under section 303.

Under the conference substitute, paragraph (2) of section 303(z) [§ 75.329] provides that, within 12 months after enactment, all areas from which pillars have been wholly or partially extracted, and abandoned areas shall be ventilated by bleeder entries or by bleeder systems or by equivalent means or be sealed.

* * * * *

Under the conference substitute, paragraph (3) of section 303(z) provides that, in the case of mines opened on or after the operative date of this title, or in the case of areas developed on or after

such date in mines opened prior to such date, the mining system shall be designed, in accordance with a plan and revisions thereof approved by the Secretary and adopted by the operator, so that, as each set of cross entries, room entries, or panel entries of the mine are abandoned, they can be isolated from the active workings of the mine with explosive-proof bulkheads approved by the Secretary or his inspector.

H.R. Rep. No. 91-761, 91st Cong., 1st Sess. 81-82, reprinted in Legislative History at 1043-1044 (emphasis added).

The statutory and regulatory language, the statutory scheme, and the legislative history lead to the conclusion that §§ 75.329 and 75.329-1 apply only to sections which were pillared or abandoned before December 30, 1970. The regulations do not apply to the Golden Eagle Mine, since the Secretary cannot show the mine was in existence before 1970.

The Secretary believes § 75.329-1(a) applies to the Golden Eagle Mine. In this respect, she relies on cases where the standard was successfully applied since 1970. See Christopher Coal Company, March 1979 (FMSHRC); Itmann Coal Company, 2 FMSHRC 1986 (1980); Mettini Coal Corp., 6 FMSHRC 1507 (1984).

The difficulty in the Secretary's position is that the above cases do not involve the issues presented here. As a result, such cases are of no precedential value.

The Secretary further contends that the legislative history supports her view. Such history has been previously discussed and it supports WFC, and not the Secretary.

As noted herein, I generally agree with the well-reasoned decision of Judge Koutras in Ziegler, supra.

Accordingly, in WEST 90-113-R, the contest of Citation No. 2930785 should be sustained and the citation should be vacated.

WEST 90-114-R

In this case, MSHA Inspector Anthony Duran issued imminent danger Order No. 3241331.

The text of the order is set forth on page 5, supra.

The evidence in support of this order contains the same defect as existed in Order No. 2930784 in WEST 90-112-R.

For the same reasons, the contest of this order should be sustained and the order vacated.

WEST 90-115-R

In this case, WFC contests Citation No. 3241332 issued by Inspector Duran under Section 104(a) of the Act. This text of the citation, which alleges a violation of 30 C.F.R. § 75.329-1(a) is set forth on page 3, supra.

As previously discussed, the cited standard, § 75.329-1(a) does not apply to the Golden Eagle Mine. Accordingly, the contest of Citation No. 3241332 is sustained and the citation vacated.

WEST 90-116-R

In this case, WFC contests Citation No. 3241333 issued by Inspector Duran.

The text of the citation is set forth on page 6, supra.

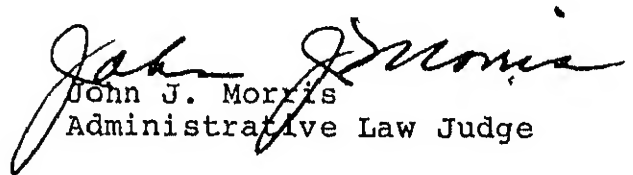
WFC contends this citation should be vacated because WFC was not apprised of the specific violation; further, the operator claims it was denied administrative due process as required by 5 U.S.C. § 534(b).

The credible evidence establishes the operator was "working on an order," but since the underlying order was invalid, this citation must necessarily be vacated.

For the foregoing reasons, I enter the following:

ORDER

All contests pending herein are SUSTAINED and all related orders and citations are VACATED.


John J. Morris
Administrative Law Judge

/ek

Distribution:

Timothy Biddle, Esq., CROWELL & MORING, 1001 Pennsylvania Avenue, N.W., Washington, D.C. 20004-2505 (Certified Mail)

Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Office Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

MINING SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041


OCT 24 1990

LOCAL UNION 1609, DISTRICT 2,	:	COMPENSATION PROCEEDING
UNITED MINE WORKERS OF	:	
AMERICA (UMWA),	:	Docket No. PENN 84-158-C
Complainant	:	Order No. 2254681; 2/16/84
v.	:	
	:	Greenwich Collieries No. 1
GREENWICH COLLIERIES,	:	
DIVISION OF PENNSYLVANIA	:	
MINES CORPORATION,	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Koutras

The complainant's unopposed motion to dismiss this proceeding on the ground that the complaining miners have been compensated and paid IS GRANTED, and this matter IS DISMISSED.


George A. Koutras
Administrative Law Judge

Distribution:

Mary Lu Jordan, Esq., United Mine Workers of America, (UMWA),
900 15th Street, N.W., Washington, DC 20005 (Certified Mail)

John T. Scott and Timothy Biddle, Esqs., Crowell & Moring,
1001 Pennsylvania Avenue, N.W., Washington, DC 20004
(Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 24 1990

JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. SE 90-19-R
	:	Citation No. 3010382; 11/1/89
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	No. 5 Mine
ADMINISTRATION (MSHA),	:	Mine ID # 01-01322
Respondent	:	
	:	Docket No. SE 90-20-R
	:	Citation No. 3009494; 11/1/89
	:	
	:	No. 7 Mine
	:	Mine ID #01-01401
	:	
	:	Docket No. SE 90-21-R
	:	Citation No. 3009294; 11/1/89
	:	
	:	No. 4 Mine
	:	Mine ID # 01-01247
	:	
	:	Docket No. SE 90-23-R
	:	Citation No. 3008996; 11/1/89
	:	
	:	No. 3 Mine
	:	Mine ID 01-00758
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 90-33
Petitioner	:	A.C. No. 01-01322-03752
v.	:	
	:	No. 5 Mine
JIM WALTER RESOURCES, INC.,	:	
Respondent	:	Docket No. SE-90-36
	:	A. C. No. 01-00758-03756-
	:	
	:	No. 3 Mine
	:	
	:	Docket No. SE 90-37
	:	A. C. No. 01-01247-03860
	:	
	:	No. 4 Mine
	:	
	:	Docket No. SE 90-38
	:	A. C. No. 01-01401-03771
	:	
	:	No. 7 Mine

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor,
U.S. Department of Labor, Birmingham, Alabama
for the Secretary of Labor;
Alfred F. Smith, Jr., Esq., and David M. Smith, Esq.,
Maynard, Cooper, Frierson, and Gale, P.C.,
Birmingham, Alabama for Jim Walter Resources, Inc.

Before: Judge Melick

These consolidated cases are before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," to contest four citations issued by the Secretary of Labor pursuant to Section 104(a) of the Act against Jim Walter Resources, Inc., (Jim Walter) and for review of civil penalties proposed by the Secretary for the violations alleged therein. More particularly Jim Walter seeks review in this case of citations issued for its refusal to acquiesce in the Secretary's demand that its Fan Stoppage Plans (Plans) contain a provision stating in relevant part as follows:

... in the event of a fan stoppage and the miners have been withdrawn from the mine to the surface, the following procedures shall be implemented:

1. Every area of the mine where miners are required to travel or work shall be examined by a certified mine examiner prior to miners entering any portion of the mine.
2. The miners will be prohibited from following the mine examiner while the examinations are being made.

The Commission discussed the underlying legal authority for the litigation of disputed ventilation plans in Secretary v. Carbon County Coal Co., 7 FMSHRC 1367 (1985). It stated in this regard as follows:

The requirement that the Secretary approve an operator's mine ventilation plan does not mean that an operator has no option but to acquiesce to the Secretary's desires regarding the contents of the plan. Legitimate disagreements as to the proper course of action are bound to occur. In attempting to resolve such differences, the Secretary and an operator must negotiate in good faith and for a reasonable period concerning a disputed provision. Where such good faith negotiation has taken place, and the operator and the Secretary remain at odds over a plan, review of the dispute may be obtained

by the operator's refusal to adopt the disputed provision, thus triggering litigation before the Commission. Penn Allegh Coal Co., 3 FMSHRC 2767, 2773 (December 1981). Carbon County proceeded accordingly in this case. The company negotiated in good faith and for a reasonable period concerning the volume of air to be supplied the auxiliary fans. Carbon County's refusal to acquiesce in the Secretary's demand that the plan contain a free discharge capacity provision led to this civil penalty proceeding.^{1/}

It is not disputed in this case that Jim Walter negotiated in good faith and for a reasonable period concerning the disputed provisions of the Plans at issue and it was Jim Walter's refusal to acquiesce in the Secretary's demand that the Plans contain the cited provisions that led to these contest and civil penalty proceedings. In a similar case I have held that the Secretary, as the moving party attempting to include the disputed provision in ventilation plans has the burden of proof. See 5 U.S.C. § 556 (d). Secretary v. Jim Walter Resources, Inc., 12 FMSHRC 1384 (1990). I also determined in that case that the Secretary must prove by a preponderance of the evidence that, without her proposed change, the mine operator's Plan does not provide an adequate measure of protection to the miners in the subject mine.^{2/} I find these legal standards applicable as well to the cases at bar.

Citation No. 3009294 alleges a violation of the standard at 30 C.F.R. § 75.321 and charges as follows: "a citation is hereby issued in that the operator is presently operating

^{1/} While the dispute in these cases involves provisions of fan stoppage plans and not ventilation plans, the resolution of disputes over such plans should analogously be resolved through the procedures discussed by the Commission in Carbon County.

^{2/} The Secretary argues that whatever decision is made by the MSHA District Manager, whether to impose a new plan provision over the operator's objection or whether to refuse to include a provision the operator desires, is to be reviewed under an "arbitrary and capricious" standard. The "arbitrary and capricious" standard is however only applicable under the Administrative Procedure Act to judicial review of final administrative action following an administrative hearing. See 5 U.S.C. § 706(2)(A).

the No. 4 Mine without having adapted [sic] an approved Fan Stoppage plan as required by 30 C.F.R. § 75.321."^{3/}

It is undisputed that the Fan Stoppage Plan adopted by Jim Walter in 1976 had been consistently interpreted by both the former MSHA District Manager and the mine operator for 12 years to permit miners to reenter the mine after a fan stoppage and evacuation sequentially after resumption of fan operations and as each section of the mine was inspected.^{4/} It is undisputed that when a new district manager for the MSHA district governing the subject mine assumed his position in 1989, he determined that the foregoing interpretation was erroneous and notified Jim Walter that as of October 11, 1989 MSHA would enforce the "national policy" allowing miners to return underground after a fan stoppage only after the entire mine has passed inspection. (Exhibit No. G-1)

A formal revision of the existing fan stoppage plan was thereafter attempted by letter dated October 17, 1989, (Exhibit G-2). Jim Walter refused to acquiesce in the attempted modification of the Plan and was cited for the instant violation on November 1, 1989, apparently under an MSHA policy providing for litigation of disputed fan stoppage plans consistent with the Commission decision in Carbon County.

^{3/}30 C.F.R. § 75.321 reads as follows:

Each operator shall adopt a plan on or before May 29, 1970, which shall provide that when any mine fan stops, immediate action shall be taken by the operator or his agent (a) to withdraw all persons from the working sections, (b) to cut off the power in the mine in a timely manner, (c) to provide for restoration of power and resumption of work if ventilation is restored within a reasonable period as set forth in the plan after the working places and other active workings where methane is likely to accumulate are reexamined by a certified person to determine if methane in amounts of 1.0 volume per centum or more exists therein, and (d) to provide for withdrawal of all persons from the mine if ventilation cannot be restored within such reasonable time. The plan and revisions thereof approved by the Secretary shall be set out in printed form and a copy shall be furnished to the Secretary or his authorized representative.

^{4/} This interpretation appears to be contrary to the plain language of the 1976 Plan and to MSHA's national policy according to the new MSHA District Manager. The relevant Plan provisions read as follows:

MSHA Ventilation Specialist Kenneth Ely, is in charge of reviewing ventilation and fan stoppage plans for the corresponding MSHA district and makes recommendations for the approval or disapproval of such plans within the framework of district and national policy and regulations. According to Ely, the procedures formerly followed in his MSHA district were not as safe as the uniform national MSHA procedures i.e. requiring the entire mine to be reexamined before any miners are permitted underground following a fan stoppage. According to Ely, the former procedures could expose miners reentering the mine to hazards such as methane. It may reasonably be inferred from Ely's testimony that the concern is that explosive levels of methane may have built-up in yet uninspected sections of the mine adjacent to areas that had been inspected and to which miners had been returned to work after a fan stoppage. An explosion or fire triggered by such methane in an adjacent section could propagate fires and/or explosions in adjacent sections where miners were working. Within this framework I am convinced that the Secretary has met her burden of proving in this case that operation of the subject mine without the disputed provisions in its Fan Stoppage Plan would indeed not provide an adequate measure of protection to the miners. Accordingly the violation in the citation is proven as charged.

In reaching this conclusion I have not disregarded the testimony of Mine Manager Jesse Cooley, an experienced graduate mining engineer, that the safety of miners is "insured" under the old plan in the same fashion as their safety would be secured under the provisions of 30 C.F.R. §§ 308 and 309. According to Cooley the cited regulatory provisions permit miners to continue working in adjacent sections while another section may be closed because of violative conditions. Cooley's argument fails however to take into consideration that imminently dangerous conditions such as highly explosive levels of methane may exist in adjacent sections -- conditions much more severe than are contemplated by sections 308 and 309. Cooley's argument is therefore inapposite to the case at bar.

The citation at bar was apparently issued pursuant to a secretarial policy providing for the challenge of disputed fan

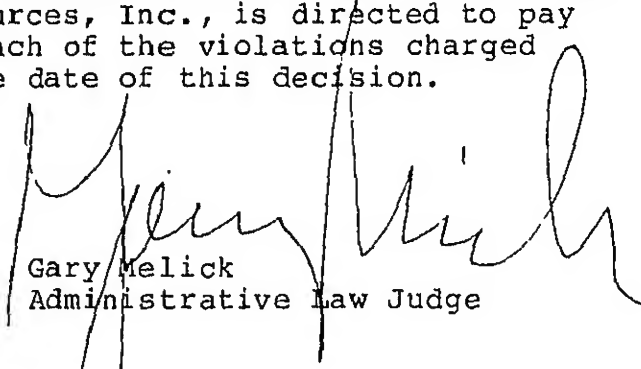
cont'd fn.4

Upon restoration of the ventilation and after the fan has been in operation with a normal water guage, a reexamination shall be made of the entire mine, as required by the regular preshift examination, before the men are permitted to reenter the mine and before any power lines leading underground are energized. (Exhibit No. G-4)

stoppage plan provisions and did not involve any hazard or negligence under the precise circumstances herein. The parties hereto have agreed that disposition of Citation No. 3009294 (Dockets SE 90-37, SE 90-21-R) will control all of the cases herein. Accordingly, considering the criteria under section 110(i) of the Act I find the proposed penalties of \$20 in each of the civil penalty proceedings to be appropriate.

ORDER

Citations No. 3010382, 3009494, 3009294, and 3008996 are affirmed and Jim Walter Resources, Inc., is directed to pay civil penalties of \$20 for each of the violations charged therein within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge

Distribution:

William Lawson, Esq., Office of the Solicitor, U.S.
Department of Labor, Suite 201, 2015 Second Avenue North,
Birmingham, AL 35203 (Certified Mail)

Alfred F. Smith, Jr., Esq., David M. Smith, Esq., Maynard,
Cooper, Frierson and Gale, P.C., 1901 6th Avenue North, Suite
2400, Birmingham, Alabama 35203 (Certified Mail)

nb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 25 1990

RANDY CUNNINGHAM, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. PENN 90-46-D
: :
CONSOLIDATION COAL COMPANY, : PITT-CD 90-3
Respondent :
: Dilworth Mine
:

DECISION

Appearances: Paul H. Girdany, Esq., Healey Whitehill,
Pittsburgh, Pennsylvania, for the Complainant;
David J. Laurent, Esq., Polito & Smock, P.C.,
Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Weisberger

Statement of the Case

Subsequent to a hearing on the merits in this case, a Decision was issued on July 12, 1990, finding that Respondent discriminated against Complainant in violation of Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1) ("the Act"). The Decision further ordered as follows: "Complainants shall file a statement, within 20 days of this Decision, indicating the specific relief requested. The statement shall be served on respondent, who shall have 20 days from the date service is attempted, to reply thereto."

Pursuant to this order, on August 1, 1990, Complainant's Counsel filed a Request for Relief. Respondent filed a Response to Complainant's Request for Relief on August 20, 1990. On August 30, 1990, a telephone conference call was initiated by the undersigned with Counsel for Complainant and Respondent, to set deadlines to allow Counsel to submit additional Briefs and evidence with regard to the issues raised by Complainant's Request for Relief and Respondent's Reply thereto. Pursuant to the telephone conference call, Complainant filed a Memorandum of Law and Additional Facts in Support of Complainant's Request for Relief. On September 24, 1990, Respondent filed a Reply to Complainant's Memorandum of Law and Additional Facts in Support of Complainant's Request for Relief. In a telephone conference call initiated by the undersigned with Counsel for both Parties,

Counsel were advised that the record still contained insufficient facts with regard to a reasonable hourly rate for attorney's fees, and the Parties were granted until October 5, 1990, to submit a stipulation or evidence on this issue. On October 4, 1990, Complainant's Counsel filed a statement containing the Parties' stipulation in this regard.

Discussion

I.

The Request for Relief requests, inter alia, lost wages of \$3,628.29 plus interest, \$4.00 for sending a registered notice of his Appeal to the Commission, \$4.50 spent on parking to consult with his attorney on March 6, 1990, and \$35.40 for mileage (to file his Complaint, to give an affidavit at the MSHA Office, to meet with MSHA Officials, to travel to his attorney's office, and to travel to the hearing), and attorney's costs of \$524.70. These items were agreed to by Respondent and hence the request for these items of relief is granted.

II.

Complainant further seeks reimbursement for travel to the Office of Employment Security on five occasions, traveling a total distance of 175 miles. In essence, it is Respondent's position that these expenses should not be allowed, as Section 105 of the Act limits relief to only those costs incurred in connection with the institution or prosecution of a discrimination claim before the Commission. In this connection, Respondent asserts that the claim for unemployment compensation was an alternate remedy. I reject Respondent's argument inasmuch as the legislative history of the Act reveals an intent to require that the scope of relief provided shall encompass ". . . all relief that is necessary to make the complaining Party whole. . . ." (Senate Report on the Act, S. Rep. No. 181, 95th Cong., 1st Sess., at 37, (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977 ("Legislative History") at 625 (1978)). It is manifest that the expense incurred in pursuing unemployment benefits are the direct consequence of having been terminated by Respondent in violation of Section 105(c) of the Act. As such, Respondent has the obligation to make Complainant whole and reimburse him for these expenses. (See, Christian v. South Hopkins Coal Company, Incorporated, 1 FMSHRC 126 (1979) (ALJ Stewart) (A discharged miner was allowed to recover the cost of his medical expenses, when he lost medical insurance coverage as a consequence of being terminated in violation of the Act); See also, Secretary on behalf of E. Bruce Noland v. Luck Quarries, 2 FMSHRC 954 (1980) (ALJ Merlin) (A miner who was discharged from his employment in violation of Section 105(c) of the Act, could not keep up payments on his truck,

and was forced to sell it, losing equity in the truck. It was held that the amount of the lost equity was recoverable). Hence, Complainant is allowed to be reimbursed for this travel at the rate of 20 cents a mile.

III.

Complainant also seeks relief for travel, on November 2, 1989, to "Masontown District 4 Office." In the itemization of this travel the following is noted: "Conference call with Consol Re: return to work." Respondent did not specifically present any argument why this amount should not be allowed. It would appear that a conference call with Respondent with regard to returning to work, was made as a direct consequence of Complainant having been terminated. As such, Complainant should be made whole by reimbursing him for this travel amount, at the rate of 20 cents a mile for a distance of 70 miles.

IV.

Complainant seek reimbursement for travel, on October 4, 1989, to the Waynesburg MSHA Office, Masontown District 4 Office, and travel on October 5, 1989, to the Masontown District 4 Office, and Dilworth Mine 27. No explanation is provided as to the reasons for this travel. Accordingly, I find Complainant has not established that this travel is in any way related to his having been discharged, and that reimbursement to him for these travel costs would make him whole. Accordingly, relief for travel on these dates is denied.

V.

Complainant seeks reimbursement for travel on October 9, 1989, to the Dilworth Mine, and then "to Masontown District 4 Office." In the itemization of his request for relief, Complainant indicates that this travel was ". . . in connection with the 24-48 hour meeting." However, Complainant did not specifically set forth the subject matter of the 24-48-hour meeting. Thus, there is no basis to conclude that this meeting was held as a consequence of Complainant's termination. As such, relief for reimbursement for travel to this meeting is denied.

VI.

Complainant further seeks reimbursement for travel on October 13 and October 30, 1989. In the itemization of the relief request for travel on these dates, the following is the only wording set forth after a listing of the destination and miles traveled: "Arbitration." It is Complainant's position that this travel should be allowed as being provided for in

Section 105(c) of the Act, which requires reimbursement for expenses "in connection with" proceedings before the Commission. Complainant further argues that if it were not for his being terminated in violation of the Act, he would not have incurred expenses pursuing arbitration. There is no evidence that the issues presented for arbitration were in any degree similar to those presented for resolution by Complainant in his Complaint before the Commission.^{1/} I thus conclude that Complainant has not established that any arbitration proceedings were not distinct and separate from the instant proceedings, and instead were related or were in connection thereto. (See, Secretary of Labor on behalf of Robert A. Ribel v. Eastern Associated Coal Corporation, 7 FMSHRC 2015 (1985), rev'd on other grounds, sub nom., Eastern Associated Coal Corp. v. Federal Mine Safety and Health Review Commission, 813 F.2d 639 (4th Cir. 1987) (An award of attorney's fees was sought in connection with proceedings initiated by a discharged miner before the State Bureau of Unemployment Compensation. The Commission agreed with the Trial Judge that there was no basis for the fee award as ". . . those State proceedings are separate and distinct from any remedy available to a miner under the Act." (Ribel, supra, at 2028)).

VII.

Complainant also seeks reimbursement for Local Union 1980, United Mine Workers of America, for lost wages of local committeemen in connection with meeting with management over Complainant's discharge, and preparing, assisting, and testifying in an "arbitration case" and the "MSHA 105(c) hearing." Complainant further seeks to reimburse District 4, United Mine Workers of America for costs expended in traveling "to District 4 Office." Also sought is reimbursement for "arbitrator's compensation," "Ramada Inn (Meeting Room for the Case)," and for miscellaneous costs.

Essentially, Complainant argues that a broad construction is to be used in interpreting Section 105(c)(3) of the Act which provides that, in essence, costs incurred by "representative of miners" shall be assessed against a discriminating operator. A plain reading of the language of Section 105(c)(3), supra, indicates that the costs incurred by a miner or a representative

^{1/} Inasmuch as the travel for "Arbitration," was subsequent to the filing of the 105(c) Complaint, it can not be concluded that the arbitration proceeding was related to the development of evidence necessary for the instant case. (c.f., Price v. Monterey Coal Company, 11 FMSHRC 1099 (1989) (ALJ Mellick), rev'd on other grounds, 12 FMSHRC 1505 (1990)).

of miners, which are to be recovered, are those ". . . for, or in connection with, the institution and prosecution of such proceedings. . . ." Complainant has not set forth in any detail the issues that were presented for arbitration. As such, I conclude that it has not been established that any costs incurred in connection with arbitration were for, or in connection with, the instant proceeding. In the same fashion, I conclude that inasmuch as there is no description of the purpose of the travel on October 9, 13, and 30, it has not been established that these costs were incurred for, or in connection with, the instant proceeding. For the same reason, I make the similar finding with regard to the miscellaneous items of cost, as well as the cost of the meeting room at the Ramada Inn.

VIII.

Complainant also submitted costs for Larry Swift, Safety Committee Chairman Local 1980, for preparation for the instant hearing, and for "witness MSHA 105(c) hearing." There is no evidence that Complainant incurred these cost. Further, although these costs were incurred in connection with the instant hearing, the Union did not intervene, and Larry Swift did not appear as representative of Complainant, but merely testified on his behalf. There is no provision in the Act which would require a discriminating operator to pay Complainant's witness for his preparation and appearance as a witness. Accordingly, these costs are denied.

IX.

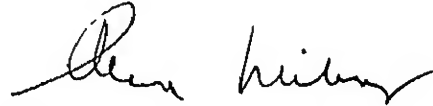
The law is well settled with regard to the method of computing attorney's fees. As set forth in Glenn Munsey v. Smitty Baker Coal Company Incorporated (5 FMSHRC 2085 (1983) (ALJ Melick) "the recognized method of computing reasonable attorney's fees begins by multiplying a reasonable hourly rate by the number of hours reasonably expended. Hensley v. Eckerhart, 461 U.S. 424, 76 L. Ed. 2d 40, (1983); Copeland v. Marshall, 641 F. 2d 880 (D.C. Cir. 1980). The resulting figure has been termed the "lodestar". The lodestar fee may then be adjusted to reflect a variety of other factors. Copeland, supra." In this connection, Complainant's Counsel initially sought a fee of \$6,130 predicated upon an itemization of 61.30 hours at \$100 an hour. On October 4, 1990, Complainant's Counsel filed a statement indicating that he and Respondent's Counsel agreed to stipulate ". . . that the appropriate hourly rate for attorney's fees should be eighty dollars (\$80.00) per hour." I conclude that the lodestar figure herein for attorney's fees is based on an hourly rate of \$80.00 multiplied by 61.30 hours. I find no basis in the record to either increase or decrease this lodestar figure.

ORDER

It is ORDERED that:

1. The Decision in this case issued July 12, 1990, is now FINAL.

2. Respondent shall, within 30 days of this Decision, pay Complainant \$9,135.89 with interest computed according to the Commission's decision in Local Union 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (1988), aff'd sub nom. Clinchfield Coal Co. v. FMSHRC 895 F.2d 773 (D.C. Cir., 1990), and calculated in accordance with the formula in Secretary/Bailey v. Arkansas Carbona, 5 FMSHRC 2042 (1984).



Avram Weisberger
Administrative Law Judge

Distribution:

Paul H. Girdany, Esq., Healey Whitehill, Law & Finance Building, 5th Floor, Pittsburgh, PA 15219 (Certified Mail)

David J. Laurent, Esq., Polito & Smock, P.C., Four Gateway Center, Suite 400, Pittsburgh, PA 15222 (Certified Mail)

Walter J. Scheller, III, Esq., Consolidation Coal Company, Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 25 1990.

ASARCO, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. SE 89-24-RM
	:	Citation No. 3253415; 10/25/88
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. SE 89-25-RM
ADMINISTRATION (MSHA),	:	Citation No. 3253416; 10/25/88
Respondent	:	
	:	Docket No. SE 89-26-RM
	:	Citation No. 3253417; 10/25/88
	:	
	:	Docket No. SE 89-27-RM
	:	Citation No. 3253418; 10/25/88
	:	
	:	Docket No. SE 89-37-RM
	:	Citation No. 3253702; 12/8/88
	:	
	:	Docket No. SE 89-38-RM
	:	Citation No. 3253703; 12/8/88
	:	
	:	Immel Mine
	:	Mine ID 40-00170
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 89-60-M
Petitioner	:	A.C. No. 40-00170-05521
v.	:	
	:	Docket No. SE 89-75-M
ASARCO, INC.,	:	A.C. No. 40-00170-05522
Respondent	:	
	:	Docket No. SE 89-105-M
	:	A.C. No. 40-00170-05524
	:	
	:	Docket No. SE 89-108-M
	:	A.C. No. 40-00170-05525
	:	
	:	Immel Mine

DECISION

Appearances: Henry Chajet, Esq., Laura E. Beverage, Esq., and Thad S. Huffman, Esq., Jackson and Kelly, Washington, D.C., for Contestant/Respondent; Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Respondent/Petitioner.

Before: Judge Fauver

These consolidated proceedings involve ASARCO's contests of six citations and the Secretary's corresponding petitions for civil penalties under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The citations, which were issued following a fatal mine accident, allege violations of 30 C.F.R. §§ 57.3401, 57.3200 and 56.3202 at ASARCO's Immel Mine.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and further findings in the Discussion below:

FINDINGS OF FACT

1. ASARCO operates a number of mines, including zinc mines and associated mill operations in Knox County, Tennessee. In October, 1988, its Tennessee Mines Division employed about 450 miners. The citations in contest were issued at its Immel Mine in Tennessee, an underground zinc mine employing about 90 miners on three shifts. These Findings pertain to the Immel Mine unless stated otherwise.

2. The zinc ore is removed by the selective open stope method using conventional mining techniques. This includes drilling into the ore body, blasting the drilled area, removing the ore, then loading, hauling and crushing the ore preliminary to the milling operations.

3. On October 24, 1988, at about 7:25 a.m., George W. Norton, a jumbo drill operator, traveled to the 2C3 stope to drill blast holes in the heading. He was transported by his foreman, Carlyle Bales, on Mr. Bales' tractor.

4. As a drill operator, Mr. Norton generally worked alone. On October 24, 1988, he was visited by Mr. Bales on three occasions after their initial entry into the heading at 7:25 a.m. About 7:50 a.m., Mr. Bales made a brief visit to see if Mr. Norton needed anything. About 10:50 a.m., Mr. Bales spent 20-25 minutes with Mr. Norton while the drill operator ate his lunch, and about 12:25 p.m., Mr. Bales returned to the heading to bring "water washers" that Mr. Norton needed for drilling.

5. About 12:10 p.m., Richard Abdella, a haul man, went to the 2C3 heading to service Mr. Norton's jumbo drill. He also supplied Mr. Norton with a piece of drill steel that the drill operator requested.

6. About 1:25 p.m., John Ellis, Jr., General Mine Foreman, discovered Mr. Norton in the 2C3 heading. Mr. Norton was crushed under a slab, which had fallen from the mine roof. He had been standing about 7 feet to the right and rear of the jumbo drill, outside the protective canopy on the drill, when the slab fell. He died of the injuries sustained.

7. The 2C3 heading, where Mr. Norton was working when he was struck by falling rock, was 47 feet wide, at its widest point, and 17 to 19 feet high. Remnants of three blast holes from a prior shift remained at the intersection of the roof and right rib.

8. The fatal ground ¹ failure extended from the right rib to the drill, a distance of 22.5 feet. Beginning at the right rib, the rock that fell increased in thickness from a feather edge to about 2 feet. Near the left side of the fall, drill holes had been started in the roof. Drill operators often used the jumbo drill to try to scale the back. In this process, they would drill in above loose roof material and then lower the drill boom in an effort to force the loose material down.

9. At the time of the accident, the face had been drilled from the left to the right. The left pillar contained a vertical row of holes that were to be used to blast off part of the pillar. The drill steel was in the last or next to last row of holes to be drilled in the face. The right drill steel was broken by the falling rock. The drill steel was 4 feet into the third hole from the top. The jumbo drill had been shut down and was not in operation when the fall was discovered. The drill had a protective canopy over the operator's controls. The canopy was struck by falling rock. Some of the structural support members were bent or broken; however, the operator's area was still protected. If the operator had been under the canopy, it is very likely that he would have survived the roof fall.

10. Mr. Norton's work area had not been roof-bolted. Approximately 174 feet outby the drill, the roof had been bolted with 5-foot long, Swellex bolts on 5-foot centers (normal bolting pattern). About 50 feet to the left of the left pillars, there was more bolting. The outby edge of the pillar that was drilled

¹ As used by the parties, and in this decision, the terms "roof," "ground" and "back" are synonymous, except where the context dictates otherwise.

had loose vertical slabs that needed to be scaled. Other loose material in the roof needed to be scaled. The pillars showed no effects of overburden weight nor were the pillars punching the back or floor. The method of blasting used tended to leave fractured rock at the top of the pillar and to create dangerous slabs in the roof. In light of ASARCO's blasting methods, the roof and ribs required special attention for examination and testing.

11. The rock that fell on the drill operator had been exposed to two blasting cycles. The drill operator was in the process of drilling the face for the third blast. He was not "back stopping" (i.e. drilling the roof for blasting out the roof).

12. A partial list of ground fall accidents ² from January, 1982, through September, 1988, revealed 10 falls of back, face, and ribs. Of these, nine were falls of scaleable material. These nine accidents occurred as follows: four while scaling, two while bolting, two during the process of loading the face holes, and one when a piece of loose material fell from between bolts. The tenth ground fall accident was in a haulageway, in an area that had been rehabilitated, and extended above the anchorage zone of the roof bolts.

13. The ground fall that killed Mr. Norton was a slab failure. The slab was cantilevered from the left to the right until the weight of the slab overcame the strength of the rock. The slab broke loose on the right rib side and the fall extended to his machine. The slab was probably formed as a result of fractures caused by the blast rounds near the back.

14. The dolomite formation in the Immel Mine was stable and the mine was not experiencing massive ground failures. The mine was, however, experiencing a problem with slab formation and loose back and rib material because of the mining methods used by ASARCO. The dolomite formation's rock strength probably contributed to this in that it requires a heavy explosive load to blast a face round. Shock waves and vibrations from the blasting and drilling contributed to formation of the fatal slab and its ultimate failure.

15. Over 90 percent of the reported ground fall accidents at this mine were the result of inadequate scaling or occurred during scaling operations.

² The list is limited to "reportable" ground fall accidents. These do not include a roof fall accident if (a) the roof was not supported, (b) no one was injured and (c) mining was not delayed beyond a certain period.

16. Mr. Vernon Denton, MSHA Supervisory Mine Inspector, and Mr. William Erickson, Mine Inspector, of MSHA's Lexington Field Office for the Southeastern District, Metal and Non-Metal Division, were assigned to investigate the fatality. They began their investigation on October 25, 1988. The report of the results of their investigation was issued on December 9, 1988.

17. Supervisor Denton and Inspector Erickson collaborated in the investigation, and issued six citations to ASARCO. These related not only to alleged violations that caused or contributed to the death of Mr. Norton, but also to other conditions in areas outside of the 2C3 heading, where the death occurred.

18. The six citations are:

<u>Number</u>	<u>Date</u>	<u>30 C.F.R. Section</u>
3253415	October 25, 1988	57.3401
3253417	October 25, 1988	57.3401
3253702	December 8, 1988	57.3200
3253416	October 25, 1988	57.3200
3253703	December 8, 1988	57.3202
3253418	October 25, 1988	57.3202

Citation Nos. 3253415 and 3253417

19. Citation No. 3253415 charges a violation of § 57.3401, based on the following allegations:

A fatal accident occurred on October 24, 1988, in the 2C3 stope at this operation as loose rock fell from the back striking the driller as he stood near the drill. The work area had not been examined and tested for loose ground in that an investigation of the site on October 25, 1988, revealed multiple rock falls or a single large fall occurred and additional loose material remained in the back and on the ribs. Reportedly, the driller did not bring a scaling bar to the site with him.

20. Citation No. 3253417 charges a violation of § 57.3401, based on the following allegations:

Two miners were observed arising from being seated directly below and in close proximity to high rib loose ground in the 3C4 stope. They had been sitting on flattened cardboard boxes at the junction of the floor and rib. The loose was about fifteen feet above them and consisted of various sizes over about a ten-foot wide area. There had been a fatal accident from fall

of loose ground in a similar type stope in this mine the day prior to this.

21. The standard cited in these two citations is found at 30 C.F.R. § 57.3401, which it provides in pertinent part:

Persons experienced in examining and testing for loose ground shall be designated by the mine operator. Appropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed, prior to work commencing, after blasting, and as ground conditions warrant during the work shift. * * *

22. There was no scaling bar at the accident scene; Mr. Norton did not use a scaling bar to test or scale the roof or ribs on the date of the accident.

23. Mr. Bales, who was Mr. Norton's supervisor, did not test or scale the roof or ribs on the date of the accident.

Citation Nos. 3253702 and 3253416

24. Citation No. 3253702 charges a violation of § 57.3200, based on the following allegations: "A fatal accident occurred on October 24, 1988, in the 2C3 stope at this operation when loose rock fell from the back striking the driller. Loose material had not been taken down or adequately supported before work was done."

25. Citation No. 3253416 charges a violation of § 57.3200, based on the following allegations:

Loose ground had not been removed from the ribs and back in places along the driller's travelway drifts between 2C3 stope and 2C3 back stope. Reportedly, the driller travelled this area to obtain his drill rig and returned through this area to the 2C3 stope prior to the fatal accident, which happened there on October 24, 1988. Reportedly, the victim did not bring a scaling bar with him.

26. The standard cited in these two citations, 30 C.F.R. § 57.3200, provides, in pertinent part: "Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area."

27. The inspectors observed loose rock on the roof and ribs as they traveled through the 2C3 stope to reach the heading where Mr. Norton had been killed. Inspector Erickson, who issued Citation No. 3253416, observed 40 to 50 pieces of loose material in the roof and ribs along the travelway, each weighing, in his

estimation, from 10 to 100 pounds. These pieces, if they fell, could cause serious injury or death to miners who traveled along this route. Inspector Erickson observed a greater quantity of loose roof material in this travelway than he had observed in any other underground mine for a long time. He attributed this condition to "poor ground control practices" at the Immel Mine (Tr. 416-41).

28. MSHA Supervisor Denton and Inspector Erickson observed the same "poor ground control practices" at the heading where Mr. Norton was killed. Using a series of photographs, which were taken by the operator shortly after the fatality, Supervisor Denton identified areas on the roof and rib where loose material had not been taken down or supported. This material was detectable and should have been taken down or supported before the accident.

29. Billy Owens, Chief of MSHA's Ground Control Division, went to the Immel Mine on November 2, 1988, at the request of MSHA's Subdistrict Manager in Knoxville, Tennessee. Mr. Owens made a thorough study of the ground conditions at the Immel Mine, particularly at the 2C3 heading where Mr. Norton was killed. During his examination of the 2C3 heading, he observed loose slabs on the left and right of the heading. He found that the slab that killed Mr. Norton should have been detected and taken down or supported before the accident.

30. In issuing Citation No. 3253702 for a violation of § 57.3200, Supervisor Denton also found that the rock that killed Mr. Norton should have been taken down or supported. Based on the investigation he and Inspector Erickson conducted, Supervisor Denton found that the fatal rock could have been detected by proper examination and testing and he found this was not done.

31. The loose slab that killed Mr. Norton would have been detectable by using proper examination and testing methods. It should have been detected and taken down or supported before the accident.

Citation Nos. 3253703 and 3253418

32. Citation No. 3253703 charges a violation of § 57.3202, based on the following allegations: "A fatal accident occurred on October 24, 1988, in the 2C3 stope at this operation when loose rock fell from the back striking the driller. A scaling bar of sufficient length to place the user out of danger of falling material was not provided."

33. Citation No. 3253418 charges a violation of § 57.3202, based on the following allegations:

The common ten-foot long scaling bar provided in many stope areas of the mine is not of sufficient length to manually scale loose ground from the fifteen to eighteen-foot high back and ribs. These bars should be about fifteen foot or longer to allow removal of high loose material without exposing the person performing the work to injury.

34. The standard cited in these two citations is 30 C.F.R. § 57.3202, which provides: "Where manual scaling is performed, a scaling bar shall be provided. This bar shall be of a length and design that will allow the removal of loose material without exposing the person performing the work to injury."

35. At the time of the issuance of these two citations the maximum length of the scaling bar provided to ASARCO's miners was 10 feet.

36. In the 2C3 heading where Mr. Norton was killed the height of the back was from 17 to 19 feet and could not be adequately and safely reached by a miner standing on the mine floor and holding a 10 foot scaling bar. This would also be the case in other areas of the Immel Mine where the mine height exceeded the ability of a miner standing on the mine floor with a 10 foot bar to adequately and safely reach the roof.

37. Miners on foot in the 2C3 heading or in any other part of the Immel Mine where the mining height was above 17 feet had no adequate means of scaling at their immediate disposal. This included the foreman, Mr. Bales, who had to travel to a number of different areas of the mine.

38. The jumbo drill is not adequate as a total means of scaling in an underground metal and non-metal mine such as ASARCO's. It can be used to scale certain kinds of loose material, but a mechanical scaler or a scaling bar used on foot or from elevated equipment can reach, angle into, and scale down loose materials that cannot be scaled by a jumbo drill. It is not a safe practice to rely solely upon a jumbo drill as a means of scaling loose materials from the roof or ribs.

39. The jumbo drill is not an adequate device for testing a mine roof.

DISCUSSION WITH FURTHER FINDINGS

Citations Nos. 3253415 and 3253417

These citations allege a violation of 30 C.F.R. § 57.3401, which provides:

§ 57.3401 Examination of ground conditions.

Persons experienced in examining and testing for loose ground shall be designated by the mine operator. Appropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed, prior to work commencing, after blasting, and as ground conditions warrant during the work shift. Underground haulageways and travelways and surface area highwalls and banks adjoining travelways shall be examined weekly or more often if changing ground conditions warrant.

One of the key issues is the meaning of "where applicable" as used in this standard. The Secretary contends that it means "where relevant" in the sense of "in the following cases," referring to the four situations specified in the standard. Under this interpretation, the operator would be required to test the ground "where work is to be performed, prior to work commencing, after blasting, and as ground conditions warrant during the work shift."

ASARCO contends that "where applicable" means "where appropriate," in the sense that testing is required "only where visual examination reveals a ground condition requiring closer scrutiny" (ASARCO Br. 18).

If the Secretary's interpretation is correct, there would be no reason for the phrase "where applicable," since the rule would simply mean "shall examine and test" Indeed, the prior rule did state "examine and test" but the qualifier "where applicable" was inserted in the current rule.

The plain meaning of the regulation is that designated personnel shall examine ground conditions in four situations and, in those situations, shall also test the ground as necessary or as ground conditions warrant. The legislative history of the rule does not indicate that a different meaning was intended. ³

³ The prior rule provided:

"Miners shall examine and test the back, face, and rib of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that prior testing and ground control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary." 30 C.F.R. § 57.3-22 (1984).

The fact that testing is required "where applicable," that is, as necessary or as ground conditions warrant, does not mean that it lies within the unlimited discretion of the operator or a miner to decide when to test. Testing applies when conditions warrant, and this is a matter of sound practice to protect miners from roof falls. I credit the following testimony, of MSHA Supervisor Denton, as a reasonable and enforceable standard for applying the testing requirement:

[T]he old standard required the testing without any thought, without any exception. So the exception was put in to allow these rare instances when it's not needed.

But in an active area, in an area where you're continually blasting, developing, driving, or stoping, you're always changing the -- all of the transient pressures in the roof, all of the pressures that resettle every time you take a blast, resettle every time a bed sags, that move every time you scale off some rock or advance another shot, that's never the same. I think testing there is basic and fundamental. It should be done every time.

[Tr. 97-98.]

fn. 3 (continued)

On March 8, 1984, the Secretary proposed a new rule, to change the "examine and test" standard to read:

"A person designated by the operator, shall examine, and test where applicable, ground conditions in active workings prior to work or travel in these areas and as ground conditions warrant during the work day. After blasting, a designated person shall examine ground conditions in areas affected by the blast before any other work is performed. Designated person shall be experienced in examining and testing the ground and understand the nature of the hazards involved." 49 Fed. Reg. 8374.

The current rule was published on October 8, 1986 (51 Fed. Reg. 36192), with the following explanation in part: "The final rule requires examination for loose ground in areas where work is to be performed prior to commencing work, after blasting, and as ground conditions warrant." Id. at 36195.

The explanations for both the proposed rule and the final rule do not state or imply that testing is always required whenever examinations are required.

Under this standard, testing is required after the roof is disturbed by blasting, scaling, or mining or when examination of the roof shows loose material, cracks, or other conditions that would cause a reasonably prudent operator to check the stability of the roof by sounding it, in order to discharge his high duty of care to protect miners from roof falls.

Citation No. 3253415 alleges:

Accident work area had not been examined and tested for loose ground in that an investigation of the site on October 25, 1988, revealed multiple rock falls or a single large fall occurred and additional loose material remained in the back and on the ribs. Reportedly, the driller did not bring a scaling bar to the site with him.

I credit the testimony and expert opinions of the Secretary's witnesses concerning the roof and rib conditions at the accident site, the failure of the operator to properly examine and test the roof before the accident, and its failure to take down or support loose material before the accident.

The roof slab that fell was approximately 22-1/2 feet wide, 35 to 40 feet long, and tapered from a thickness of 2 feet (near the drill) down to a feathered end less than an inch thick (near the right rib). It was cantilevered from over the drill and extended to the right rib. Mr. Norton was killed about 7 feet to the right and rear of the drill. Had the roof to the right of the drill been tested with a scaling (or sounding) bar, the reliable evidence shows that it would have sounded drummy (hollow), showing the need to take down the drummy area or support it. There was no scaling bar at the accident scene because Mr. Norton and Mr. Bales did not test the roof with a scaling or sounding bar on the day of the accident.

The "belly" in the roof that miners had tried to take down about a week before the accident was part of the slab that fell in the fatal accident. The belly was a sign of trouble with the roof, and ample reason for testing the roof before Mr. Norton worked under it. Also, attempts to take down roof material can further weaken the roof, so that if the material cannot be taken down it should be supported or dangered off. This was not done.

Had Mr. Norton or Mr. Bales properly examined the roof before the accident, they would have seen the belly; they also would have seen the loose materials later observed by Mr. Denton, Mr. Owens and other witnesses who testified for the Secretary.

The requirement in § 57.3401, to "examine" the roof "in areas where work is to be performed, prior to work commencing,

after blasting, and as ground conditions warrant" is not an empty provision that can be satisfied simply by looking up at the roof. The provision requires that "Persons experienced in examining and testing for loose ground shall be designated by the miner operator" for examining and testing. This means a careful examination by an experienced person. While "examination" may be visual only, it means careful, informed observations with appropriate accountability. Where loose materials in a roof are present and left uncorrected (i.e. not taken down, supported or endangered off), where miners work or travel, there is a prima facie indication that the roof was not properly examined within the meaning of § 57.3401. I find that on Mr. Norton's shift the roof was not properly examined before the accident. This constituted a violation of § 57.3401.

I also find that the roof was not tested as required by § 57.3401. The loose material in the roof and ribs observed by the Secretary's witnesses as well as the blasting-mucking-drilling cycle created a duty to test the roof before the accident. But the roof was not tested. Mr. Bales was at the site several times before the accident, and he did not test the roof. Mr. Norton did not have a scaling or sounding bar with him and therefore could not have tested the roof.

I reject ASARCO's contention that using the jumbo drill to "rattle the back" is a competent alternative method of testing a mine roof within the meaning of § 75.3401. I fully credit the testimony of the Secretary's expert witnesses, including Mr. Owens, Mr. Goff, and Mr. Denton, on this point, and hold that the jumbo drill is not an adequate device for testing a mine roof.

Billy D. Owens, Chief of MSHA's Ground Support Division, testified that the jumbo drill is not an adequate device for testing or sounding the roof. Tr. 675. His testimony is most instructive in pointing out that miners can mislead themselves (or be misled) into believing that by using the jumbo drill to test the roof they can tell good roof from bad roof (Tr. 675-677):

Q. Mr. Owens, you heard the testimony of the miners who . . . who testified previously in relation to using the jumbo drill to test with. Can you use the jumbo drill to test the ground or the back?

A. No, the jumbo drill is not an adequate devise for testing or sounding the back. In my experience with drillers -- rock drillers, roof drillers -- these are very proud people. They have a lot of confidence in their abilities, and they think they can do -- that -- that they can do almost anything with their drill. They know their equipment real well. Like I say,

they're extremely proud. I've been told that they can tell -- they can sound the roof with the drills. They can drill the roof, determine voids in the roof. They can tell when the roof is hitting partings or weak material in the roof -- going through different beds.

Q. When you say you've been told, have you talked to other drillers in the past --

A. Yes. Yes, I have.

Q. -- during the course of your investigations or evaluations?

A. Numerous times in -- in a lot of the investigations, we use a fiber optic fluoroscope which is a devise -- we have a nine foot and fifteen foot fluoroscope which runs a light through a fiber optic cable so that we can actually look up into a drill hole in the roof.

Q. Have you had occasion to try to verify whether or not the drill operator was accurate in his --

A. Yes.

Q. -- of the drill to test?

A. We've had places where people have told us that the roof is sound, no problems; it's in excellent shape. Then we've fluoroscoped the hole, and, about 18 inches up in the roof, we've found half-inch separations. The drillers have gone through small clay partings which they didn't pick up which could be of potential danger. It's -- once a clay parting gets wet or is -- it becomes lubricated, and it's usually a place where roof separation will occur. However, these drillers who have numerous years of experience have told us . . . with the utmost confidence that there's no problems with the roof -- no separations. It's solid and it's sound.

* * * * *

Q. [U]nder current technology, what do you consider . . . the most efficient means of testing the -- the back of the roof?

A. It's still using a -- the best method is still to use a steel rod to test the roof. The -- what is called a sound in the roof. Infrared has been tried to be used with the theory that a slab would be colder

than the rest of the area because air gets in behind the slab, but that technology hasn't proven out yet. So far, it's still the physical touch of the man striking the roof with a steel object.

Q. [W]hat's the difference in the -- in the result of test -- striking the roof with the -- with the ground bar or the metal bar? . . . [H]ow do you compare the two results? [Using a jumbo drill or a sounding bar.]

A. The -- striking it, you get a different sound, plus the guy has the actual feel.

It's been mentioned here that the people can tell that -- they can tell a roof by striking the -- the sound -- there's a different sound between hitting a dry wall with a two by four behind it and a dry wall with the two by four not behind it. All they're going by is sound.

When a person is going with a -- holding a -- a piece of metal rod hitting the back with it, not only do you get the sound, but there's a vibration difference. The same way when you hit a dry wall with the two by four behind it, it feels solid. When you hit the dry wall without the two by four behind it, there's a different feel to that dry wall and the same way with the rock in the back. The loose rock will -- will be drummy. It will have a little give. The -- you have a sound and a feel that is different than hitting solid rock.

Q. And you heard the testimony of these miners . . . and the testimony of Mr. Denton in relation to . . . the sound levels of the jumbo drill . . . and its use or non use for sounding the roof. What's your opinion about whether or not there is a sound or noise level -- difficulty with the drill?

A. The sounding with a jumbo drill, if two sound level[s] -- if two sources are emitting sound, the higher decibel level of sound will mask the second sound. It's called masking. In masking when the second sound is masked, . . . not only is it hard to tell exactly what the sound is, it is also difficult to tell direction and orientation of the sound or . . . the source of the lower decibel sound. The drill rigs put out a higher decibel level than striking the back; therefore, the decibel levels put out by the drill would mask the sound coming from . . . striking the back which would make it difficult to tell whether it

was solid back, [or] bad back. It would also make it difficult to get the orientation of the signal.

Similarly, Mr. Goff, a noise expert with extensive experience, testified that the noise of the jumbo drill overshadows the information miners would need to test the roof and therefore the jumbo drill is not an adequate device to test the roof.

I hold that, before the accident, ASARCO violated § 57.3401 by failing to test the roof at the accident site on October 24, 1988.

I find that it was highly negligent of ASARCO to permit and encourage its drillers to try use the jumbo drill instead of a sounding bar to test the roof. Mr. Norton was an experienced miner who lost his life because he and his supervisor did not detect a loose overhead slab that could have been detected by proper testing. Following ASARCO's faulty practice, they took that risk without using the best known, safest, and commonly accepted tool for detecting a loose roof -- a sounding bar.

The gravity of ASARCO's violation of § 57.3401, i.e., its failure to properly examine and test the ground above Mr. Norton, was very high and plainly contributed to his death. The gravity is even higher in light of the fact that there was a "lag" in ASARCO's roof bolting and it had not roof bolted the area where Mr. Norton was killed. It is not being considered or decided here whether the failure to roof bolt was itself a violation of a separate regulation, because ASARCO is not charged with such a violation. However, the "lag" in the progress of roof bolting, which was known to the operator, is a factor in considering the gravity of ASARCO's failure to properly examine and test the ground at the accident site, because the failure to roof bolt Mr. Norton's work area increased the danger of a roof fall.⁴

⁴ Thus, in addition to finding that the rock that killed Mr. Norton was a detectable slab that should have been taken down or supported, Mr. Owens also testified in relation to the 47 foot width of this heading:

"[I]n dolomite and limestone, we have found that the best mining widths appear to be 35 to 40 feet. That -- for self-supporting -- for supporting without bolts. Then in the greater widths than 35 to 40 feet, there's no way it can be supported and typically no way it can be supported without bolts, so mining widths in these types of formation of greater than 40 feet tend to develop ground stability problems."

[Tr. 661-662].

Based upon his observations of the accident site and the testimony of many witnesses who testified at the hearing in regard to the adverse ground conditions in the Immel Mine in general and in the 2C3 stope in particular, Mr. Owens testified that he believed that the heading where Mr. Norton was killed should have been bolted. He stated that: "There's been quite a bit of testimony about people trying to pull loose down in that area, trying to bring down bellies, concern about the ground. In those kind of situations, that area should have been bolted." Tr. 703-704.

I credit Mr. Owens' expert opinion that, if the 2C3 heading had been roof bolted to within 14 feet of the face, according to the general recommendation in his report, the roof would have held and Mr. Norton would not have been killed.

Mr. Owens also testified that one of ASARCO's officials told him, at the time of his visit to the mine on November 2, 1988, that there had been a lag time in the bolting in the 2C3 stope, "that the area was intended to be bolted, however, there was a lag in their bolting -- getting the bolting up there." Tr. 664 and 725.

MSHA Inspector Charles McDaniel, who was the first MSHA Inspector to visit the Immel Mine after the fatal ground fall in the 2C3 heading, gave his opinion that this heading was too wide and should have been bolted and that bolting would have held the slab that fell and killed Mr. Norton. Tr. 1355-1356 and 1369.

Inspector McDaniel also testified that the Immel Mine had a history of ground stability problems.

Mr. Richard Hubbard, a roof bolter, testified that the ground conditions in the 2C3 stope were bad and required that the stope be roof bolted as it advanced. Tr. 259-260, 275.

Mr. Hubbard stated that in July or August, 1988, he had been sent into the 2C3 stope to roof bolt by Mr. Guy Bales, his foreman. The area where he was working at the time was about 90-100 feet from the point in the stope where Mr. Norton was killed. He stated that after he had completed drilling five holes, Jim Jacques, the Mine Superintendent, directed him to stop because, according to Mr. Jacques, the area was going to be back stoped. Mr. Hubbard told Mr. Jacques that in order to make the area secure roof bolts were needed, then Mr. Jacques allowed him to continue. He was not able to complete his bolting, however, because the equipment he needed to do the bolting was taken away,

fn. 4 (continued)

and he went on vacation shortly thereafter. He stated that the next time he was in the 2C3 stope was when Mr. Norton's body was removed, and he saw the five, still unfilled, holes for roof bolts that he had drilled in July or August. Tr. 266 and 268-273.

Mr. William Ellis is a machine man at the Immel Mine. At the time of Mr. Norton's death, he was in training with Mr. Richard "Tommy" Frazier, drilling with the jumbo drill. They worked in the 2C3 stope about 1 week before the accident, in an area 10 to 20 feet from where the fatal ground fall occurred. He described the ground at the Immel Mine as ". . . bad about falling out. You have to bolt it a lot." Mr. Ellis stated that he and Mr. Frazier thought that this area needed bolting, but that they worked in it anyway. Tr. 315-320.

Mr. Ellis testified that the heading in the 2C3 stope where he had worked approximately 1 week before the fatal ground fall was too wide and needed to be bolted. Tr. 329.

Mr. Ellis stated that he and Mr. Frazier had attempted to drill down a "belly" in the ground a week before but were unable to get it down. He stated that he believed that this may have been the rock that killed Mr. Norton. Tr. 318 and 333-334.

Mr. Richard "Tommy" Frazier worked for ASARCO and its predecessor for 26 years until September, 1989. He worked at the Immel Mine from 1972 until his resignation. In October, 1988, Mr. Frazier was the jumbo drill operator on the second shift, using the same jumbo drill that Mr. Norton was using on the first shift when he was killed. Tr. 539-541.

Mr. Frazier testified that the ground conditions in the 2C3 stope were bad, and that roof bolts were needed. Tr. 550-551. It was Mr. Frazier's opinion that the 2C3 heading was too wide. Tr. 544.

Mr. Frazier stated that the "belly" which he and Mr. Ellis tried to pull down about 1 week before Mr. Norton's death was within 10 to 15 feet of the spot where Mr. Norton was killed. He stated that he had tried unsuccessfully to drill the belly down, spending about 45 minutes to 1 hour in the attempt. Mr. Frazier thought that this belly may have been the rock, or at least part

This citation alleges:

Two miners were observed arising from being seated directly below and in close proximity to high rib loose ground in the 3C4 stope. They had been sitting on flattened cardboard boxes at the junction of the floor and rib. The loose was about fifteen feet above them and consisted of various sizes over about a ten-foot wide area.

There had been a fatal accident from fall of loose ground from similar type stope in this mine the day prior to this.

fn. 4 (continued)

of the rock, that fell from the roof and struck Mr. Norton. Tr. 543-545, 552, 585, 593-594 and R-16 (Erickson's Sketch Enlarged).

Inspector McDaniel testified that, based on his observation of the heading, he believed that the rock that fell was a "belly." Tr. 1341.

Hobart Tucker is a loader operator at the Immel Mine and had worked removing muck from the 2C3 heading on the 11:00 p.m. to 7:00 a.m. shift (Friday night-Saturday morning) prior to Monday, October 24, 1988, the date of Mr. Norton's death. He had been in the 2C3 stope about 50 times before the fatality. He stated that the 2C3 stope needed to be bolted:

"I feel that the ground needs to be bolted in that particular area. I mean as a general rule, because anywhere's trouble, you know, with some ground you need to keep it bolted. Of course, I think the ground ought to be bolted for the simple fact of support. I think it helps the ground a lot to stay safe, as a general rule, over periods of time."

[Tr. 377-380].

James Jacques, Immel Mine's Superintendent, testified in his deposition that 75 percent of the 2C3 stope had been bolted before Mr. Norton's death (G-40 [Jacques' Deposition] at 56-58).

John Ellis, Jr., Immel General Mine Foreman, testified in his deposition that it was Immel's practice to bolt all of the headings (G-42 at 11-12).

The undisputed evidence sustains this citation. The inspectors gave their expert opinions that the loose material they observed above the two sitting miners was hazardous and obvious. ASARCO did not produce either of the miners to dispute this, although their names were known to management.

The fact that the miners were sitting beneath loose, hazardous materials is a prima facie indication that the rib had not been properly examined under § 57.3401. Had it been properly examined, it would have been taken down, supported, or dangered off.

Considering that this violation occurred the day after a fatal ground fall accident, the facts indicate high negligence in ASARCO's failure to examine the ground before this violation and to properly train miners not to sit under a roof or rib without properly examining overhead conditions.

Citation Nos. 3253702 and 3253416

These citations allege violations of 30 C.F.R. § 57.3200, which provides:

Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

Citation No. 3253702 alleges that: "A fatal accident occurred on October 24, 1988, in the 2C3 stope at this operation when loose rock fell from the back striking the driller. Loose material had not been taken down or adequately supported before work was done."

I credit the testimony and expert opinions of the Secretary's witnesses that the slab that killed Mr. Norton was hazardous, detectable, and should have been taken down, supported, or dangered off before the accident. Discussion of this evidence is included under Citation No. 3253415, above, and is incorporated here.

I find that ASARCO was highly negligent in failing to take the necessary precautions to protect Mr. Norton from the danger of a roof fall in his work area. ASARCO's negligence includes the negligence of Mr. Norton and his supervisor, Mr. Bales.

Citation No. 3253416 is based upon the inspector's observations of loose material in the roof and ribs of the travelway between the 2C3 stope and the 2C3 back stope.

Inspector Erickson observed 40 to 50 pieces of loose material in the roof and ribs along the travelway, each weighing, in his estimation, from 10 to 100 pounds. These pieces, if they fell, could cause serious injury or death to miners who traveled along this route. Inspector Erickson observed a greater quantity of loose material in this travelway than he had observed at any other underground mining operation for a long time. He attributed the poor conditions of roof and ribs to "poor ground control practices" at the Immel Mine.

The inspectors observed the same "poor ground control practices" in or near the heading where Mr. Norton was killed.

The evidence fully supports this citation. The roof conditions were hazardous and obvious. I find that ASARCO was highly negligent in failing to correct them.

ASARCO contends that the citation fails to give adequate notice of the locations of the loose material in the roof and ribs. However, the inspectors pointed out these locations to the management representatives who were with them at the time the inspectors observed the loose material. This fact and the wording of the citation constitute adequate notice and specificity of the charge.

Citations Nos. 3253703 and 3253418

These citations allege a violation of 30 C.F.R. § 57.3202, which provides: "Where manual scaling is performed, a scaling bar shall be provided. This bar shall be of a length and design that will allow the removal of loose material without exposing the person performing the work to injury."

Citation No. 3253703 alleges that a "scaling bar of sufficient length to place the user out of danger of falling material was not provided" at the accident site where Mr. Norton was killed. ASARCO contends that § 57.3202 does not apply because "Norton was not manually scaling, but rather was scaling with a jumbo drill." ASARCO Br. 29.

It is clear that Mr. Norton was not engaged in manual scaling, because he did not take a scaling bar to his work site. If he did any scaling at all, he probably tried to use the jumbo drill.⁵ Although the jumbo drill can be used to scale certain

⁵ Some witnesses for ASARCO testified that the jumbo drill had been used for a long time to scale ground at the Immel Mine. However, the operator's Safety Rules Booklet makes no mention of the use of the jumbo drill to scale. It refers only to the use of a scaling bar. In pertinent part, it provides:

kinds of loose material, it is not designed as a scaler; a mechanical scaler or a scaling bar used on foot or on elevated equipment can reach, angle into, and take down loose material that cannot be taken down by a jumbo drill. Thus, it is not a safe practice for an operator to rely solely on the jumbo drill for scaling -- because loose material could be missed. Nonetheless, since Mr. Norton was not engaged in manual scaling on the day of the accident, § 57.3202 did not apply. Citation No. 3253703 will be vacated.

Citation No. 3253418 alleges that:

The common ten-foot long scaling bar provided in many stope areas of the mine is not of sufficient length to manually scale loose ground from the fifteen to eighteen-foot high back and ribs. These bars should be about fifteen foot or longer to allow removal of high loose material without exposing the person performing the work to injury.

The cited standard does not require that scaling bars be of any particular length. Indeed, standard practice shows that if a bar is too short to reach the roof or ribs safely and effectively, the bar may be used in conjunction with lift equipment. Accordingly, this citation will be vacated.

Multiple Violations

ASARCO contends that certain citations are duplicative, resting on the same factual allegations. However, discrete violations are alleged which are not duplicative. Citation

fn. 5 (continued)

MINING DEPARTMENT

- * * * * *
6. It is the responsibility of every worker to scale down all loose ground that he finds. If for any reason this is not possible, he must notify his foreman.
 7. Be sure you use a proper length bar which is sharp and has bit (sic) on only one end. Bars when not in use must be stored in a safe location out of vehicle traffic.
 8. Barraging down must be done from a safe location. Footing shall be secure.

No. 3253415 rests upon a failure to properly examine and to test the ground before Mr. Norton was killed, a violation of § 57.3401. Citation No. 3253702 rests upon a failure to take down, support, or danger off hazardous, loose material before Mr. Norton was killed, a separate violation of § 57.3200. Citation Nos. 3253703 and 3253418, which involve the length of scaling bars, are being vacated, and need not be considered under the issue of duplicative charges.

CONCLUSIONS OF LAW

1. The judge has jurisdiction in these proceedings.
2. ASARCO violated the safety standards as alleged in the following citations:

<u>Citation</u>	<u>30 C.F.R. Section</u>
3253415	57.3401
3243417	57.3401
3253702	57.3200
3253416	57.3200

3. The Secretary failed to prove a violation of 30 C.F.R. § 57.3202 as alleged in Citation Nos. 3253418 and 3253703.

Civil Penalties

Considering each of the criteria for a civil penalty in § 110(i) of the Act, I find that the following civil penalties are appropriate for the violations found herein:

<u>Citation</u>	<u>Civil Penalty</u>
3253415	\$6,000
3243417	\$ 200
3253702	\$6,000
3253416	\$ 200

ORDER

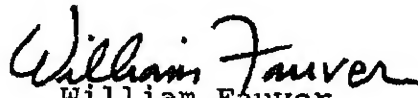
WHEREFORE, IT IS ORDERED THAT:

1. Citation No. 3253415 is AFFIRMED.
2. Citation No. 3253417 is AFFIRMED.
3. Citation No. 3253702 is AFFIRMED.
4. Citation No. 3253416 is AFFIRMED.
5. Citation No. 3253703 is VACATED.

6. Citation No. 3253418 is VACATED.

7. The motions for partial summary judgment and dismissal are DENIED in light of the above disposition of all citations. Material issues of fact warranted a consideration of the evidence from both parties before deciding the issues raised.

8. ASARCO shall pay the above assessed civil penalties of \$12,400 within 30 days of the date of this decision.



William Fauver
Administrative Law Judge

Distribution:

Henry Chajet, Esq., Laura E. Beverage, Esq., and Thad S. Huffman, Esq., Jackson and Kelly, 1701 Pennsylvania Avenue, N.W., Suite 650, Washington, DC 20006 (Certified Mail)

Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
THE FEDERAL BUILDING
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

OCT 25 1990

WARREN ROSE, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. WEST 90-142-DM
: WE-MD 90-04
CUNNINGHAM SAND & GRAVEL, : Crestline Pit
Respondent :

DECISION

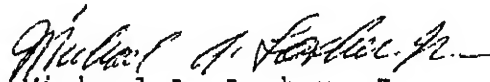
Appearances: Michael D. Kinkley, Esq., Spokane, Washington,
for Complainant;
Thomas W. McLane, Esq., PAINE, HAMBLIN, COFFIN,
BROOKE & MILLER, Spokane, Washington,
for Respondent.

Before: Judge Lasher

This matter was initiated by the filing of a complaint by Warren Rose on March 16, 1990, pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (herein "the Act").

Following completion of formal hearing in this matter in August 1990, the parties reached an amicable resolution of the matter reflected in a "Release in Full" duly executed by the individual Complainant and his wife and respondent. A copy of this agreement is contained in the Commission's case file, clearly showing the parties' intent to terminate the litigation of this matter, and calling for dismissal of this proceeding with prejudice, without costs or attorneys' fees to either party.

Accordingly, this matter, having been voluntarily resolved by the parties in a reasonable and proper manner, their agreement is APPROVED and this proceeding is DISMISSED WITH PREJUDICE.


Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Mr. Warren Rose, 2420 Heine Road, Chewelah, WA 99109
(Certified Mail)

Mr. Kevin Bredesen, Personnel Manager, ACME MATERIALS & CON-
STRUCTION COMPANY, P.O. Box 2530, Spokane, WA 99220 (Certified
Mail)

Michael D. Kinkley, Esq., Northtown Office Building, Suite 701,
N. 4407 Division, Spokane, WA 99207 (Certified Mail)

/ek

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 26 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 90-137
Petitioner	:	A. C. No. 15-02502-03565
v.	:	
	:	Docket No. KENT 90-142
SHAMROCK COAL COMPANY, INC.,	:	A. C. No. 15-02502-03566
Respondent	:	
	:	Shamrock No. 18 Series
	:	

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor,
U. S. Department of Labor, Nashville, Tennessee,
for the Secretary;
Neville Smith, Esq., Smith & Smith, Manchester,
Kentucky, for the Respondent.

Before: Judge Weisberger

Statement of the Case

These consolidated Civil Penalty Proceedings are before me based upon Petitions for Assessment of Civil Penalty filed by the Secretary (Petitioner), alleging violations of various mandatory safety standards set forth in Volume 30 of the Code of Federal Regulations. The Operator (Respondent) filed Answers in these proceedings, and pursuant to notice, the cases were heard in Richmond, Kentucky, on August 16, 1990. (Docket No. KENT 90-136, which had previously consolidated with the cases involved in this proceeding, was severed based upon an oral Motion made by Petitioner and not opposed by Respondent.) At the hearing, James A. Delp testified for Petitioner and Gordon Couch testified for Respondent.

Stipulations

The following stipulations were agreed to by both Parties:

1. That the proposed penalty would not affect the Operator's ability to continue in business and would be appropriate to the size of the business.

2. That, where appropriate to the nature of the citation, the Operator demonstrated good faith in attempting to achieve rapid compliance after being notified of the alleged violations.

3. The Operator's history of prior violations is shown in Government's Exhibit 1 (Gx 1).

Docket No. KENT 90-137

Citation No. 3206452

On January 10, 1990, James Delp, an inspector employed by the Mine Safety and Health Administration, issued Citation No. 3206452 alleging a violation of 30 C.F.R. § 75.403, in that sampling, taken at the various locations of the No. 1 Return Entry of the 006 Section of Respondent's Shamrock No. 18 Mine, revealed that rock dust samples had incombustible contents less than 80 percent. Respondent did not adduce any evidence to rebut or impeach the figures set forth in the Dust Sampling Lab Report, which revealed that in 31 of the the 38 samples taken in the No. 1 Return Entry, the incombustible content of the rock dust was less than 80 percent. 30 C.F.R. § 75.403, in essence, mandates that the rock dust in the area in question have an incombustible content of not less than 80 percent. Accordingly, I find that the Respondent herein did violate Section 75.403, supra.

According to the uncontradicted testimony of Delp, the purpose of rock coal dust is to hold down combustible materials, such as coal dust, which he indicated to be highly flammable and explosive. He indicated that if the rock dust does not have the appropriate level of incombustible material, there could be an ignition. According to Delp, if there would be a methane ignition at the face with enough pressure to raise the coal dust and place it in suspension, there would be an explosion. However, he indicated, on cross-examination, that the area in question does not produce a great amount of methane. He also indicated that there were various items of equipment at the face, such as a continuous miner, two shuttle cars, a roof bolting machine, and a scoop, all of which are potential sources of an electrical spark. The record does not contain evidence of any deficiency of any of the equipment present at the face, which would have rendered it reasonably likely for a spark to have occurred. Also Delp indicated that the mine in question does not liberate a great amount of methane. Thus, although the violation herein could have contributed to the hazard of the propagation of an explosion, I find that the evidence fails to establish that there was any reasonable likelihood of a ignition. Accordingly, I find that the violation herein was not significant and substantial. (See, Mathies Coal Co., (FMSHRC 1, 3-4 (1984)).

Inasmuch as the lack of the appropriate incombustible content of the rock dust can lead to the propagation of an explosion, I find that the violation herein was of a moderately high level of gravity. Petitioner has not adduced any evidence to base a decision that Respondent either knew or reasonably should have known that the rock dust in question did not have the appropriate level of incombustible material. Accordingly, I find that the Respondent did not act with more than low negligence in connection with the violation herein. Taking into account the remaining statutory factors of 110(1) of the Act, as stipulated to by the Parties, I conclude that a penalty herein of \$300 is appropriate.

Citation No. 3206454

On January 10, 1990, Delp found that the deluge water spray system for the 009 Section head drive was inoperative, as the water line was not connected. Respondent did not contradict or otherwise impeach this testimony. I therefore find that Respondent herein violated 30 C.F.R. § 75.1101-1(a) as alleged.

Delp indicated that if the deluge water system, designed to dump large quantities of water on the head drive, is not operative due to the fact that it was not connected to the water source, there is a hazard of a fire at the belt not being suppressed resulting in smoke and noxious gasses. He indicated that there were various materials which could potentially burn, such as several gallons of oil in metal containers, and various timbers and wooden cribs. However, he did not indicate the distance of these materials to the head drive, and it is noted that the oil was contained in metal containers. Also, although he indicated that the area is known as one that accumulates float coal dust, and that the belt was in operation and carrying coal, he was unable to say whether he observed coal dust on the belt, and did not specifically indicate that there was any coal dust around the head drive. Further, although he noted that there was a potential of fire due to friction of rollers and various components, as well as sparks from various electrical equipment at the head drive, there was no evidence adduced as to a specific condition of the various equipment which would make the hazard of an ignition reasonably likely to have occurred. I thus conclude that it has not been established that the violation herein was significant and substantial. (See, Mathies, supra).

Inasmuch as the violation herein could have resulted in the propagation of a fire, producing intense smoke and noxious gasses, and the same could have been carried by the belt to other areas, I conclude that the violation herein was of a moderate high level of gravity.

Delp was asked as to whether it was obvious that the water supply had not been hooked up to the system. He indicated that it was obvious to him. Further, he said that Respondent's foreman, Heatch Begley Jr., who was with him at the time did not explain why the water was not hooked up, and in general did not make any comment. I find that Petitioner has not adduced sufficient facts as to the degree of Respondent's negligence. There is no evidence as to how long the condition had existed prior to Delp's inspection. Further, although Delp indicated that the condition was obvious to him, there were no specific facts adduced as to either a description of the site where the water had been disconnected or its specific location. Nor was any evidence presented as to a specific description of its visibility. Hence, I conclude that it has not been established that the Respondent herein operated with more than a low degree of negligence in connection with the violation herein. I conclude that a penalty of \$100 is appropriate.

Citation No. 3206457

On January 23, 1990, Delp indicated that while in the intake entry, he observed a hole approximately 3 by 3 feet in an overcast that ran through and perpendicular to the intake entry. The overcast had been constructed of concrete blocks. The hole that Delp observed still contained parts of concrete blocks, but had been covered by a plastic lined brattice (brattice cloth). Delp issued Citation No. 3206457 essentially alleging that Respondent had not followed its ventilation plan, ". . . which requires overcast to be constructed of 4" x 8" x 16" concrete block and pilaster" (sic).

According to Delp the overcast was constructed, essentially, to prevent the air in the belt from mixing with intake air. He indicated that the belt line in the overcast goes to the face and contains various gasses and dust. He indicated that in the event of a fire, the brattice cloth could have melted, allowing the contaminants in the belt line to enter the intake entry, which serves as the escapeway. Essentially it was Delp's testimony that as the intake air passes under the overcast, it would create suction which would result in the intake air being the path of least resistance. Accordingly, air from the belt drive containing various gasses would enter the intake air.

I do not place much weight on this theory as Delp did not explain how such suction is created. Further, he indicated that as a general proposition air takes a path from high pressure to low pressure. In this connection he noted that the intake entry is under more pressure than the air in the belt line in the overcast. Accordingly it does not appear likely that air from the overcast would enter the intake return.

Further, the sole basis for the violation cited in the Citation is the assertion that the use of brattice cloth to cover a hole in an overcast violates the ventilation plan. As pertinent, Respondent's violation plan, with regard to materials and methods used to construct overcasts, provides as follows: "4" x 8" x 16" concrete block and pilaster, a noncombustible material may be used in some conditions." (Emphasis added). (Government Exhibit 5, page 3). "Combustible" is defined in Webster's Third New International Dictionary (1986 ed.) ("Webster's") as follows: "1: capable of undergoing combustion or burning - used esp. of materials that catch fire and burn when subjected to fire;" "Combustion" is defined in "Webster's" as "1: a process or instance of burning:" "Burning" is defined in "Webster's" as "1 a: a consuming or being consumed by a fire or heat."

Thus, Petitioner, in order to prevail, must establish that the brattice cloth in question was not incapable of burning. For the reasons that follow, I find that Petitioner has failed to meet this burden. Delp, who has been with MSHA only since January 1989, but has 15 years experience as a miner, including approximately 12 years as a section foreman, testified on direct examination that "I believe it will burn" (Tr. 70). However, on cross-examination he was asked whether the material in question was not combustible and he answered as follows: "I don't know if it was combustible, but I do know that it would melt" (Tr. 102). In addition, he agreed it was ". . . approved flame-resistant material" (Tr. 102). Gordon Couch, who has been Respondent's safety director for 15 years, and previously involved as a mine inspector for the Department of Interior for 8 years, and served as coal mine inspection supervisor for 2 years, testified with regard to the nature of the material in question as follows: ". . . it is not combustible. It is deemed flame-resistant by the tests conducted by the Bureau of Mines" (Tr. 112). Further, Couch indicated that it is routine to remove blocks and temporarily cover the resulting openings with the material identified by Delp's testimony. Couch's testimony, in these regards, was not impeached or rebutted by Petitioner. Accordingly, I find that the record fails to establish that the brattice cloth in question is not "non-combustible." Thus, it has not been proven that the usage of the brattice cloth herein violated the ventilation plan. However, Citation No. 3206457 is to be dismissed.

Citation No. 3206323

Delp indicated that on January 23, 1990, Respondent's foreman, a Mr. Asher, opened the water valve on Respondent's sprinkler system. Delp indicated that this is the manner that he usually tests the sprinkler system, at Respondent's mine. He indicated that the belt did not stop and neither a visual nor an auditory alarm was emitted. He issued a Citation alleging a violation of 30 C.F.R. § 75.1101-10, which provides, as pertinent, that each water sprinkler system shall be equipped with a device to stop the belt in the event of a rise in temperature, and the device ". . . shall be capable of giving both an audible and visual warning when a fire occurs."

Respondent did not rebut the testimony of Delp that when the system was tested it did not stop the belt drive, nor did it emit an audible or visual warning. Nor did Respondent adduce testimony from any witness which tend to establish that the method of testing used by Delp was not the proper or usual one. Accordingly, I find Respondent herein did violate Section 75.1101-10, supra, as alleged.

Delp indicated that the hazards of a fire are the same as those he described in his testimony with regard to Citation No. 3206454, which involved the deluge system. Also, on the same date, concerning the same belt, he issued Citation No. 3206321 alleging that there were no fire hose outlets for a distance of approximately 900 feet along the belt. In addition, he issued Citation No. 3206322 alleging that there was coal dust a quarter inch to 20 inches in depth, along the side and under the belt conveyor for a distance of approximately 900 feet. However, Delp did not describe the presence of any specific condition which would make the event of ignition reasonably likely to occur. Accordingly, I find that it has not been established that the violation herein was significant and substantial.

The violation herein could lead to the propagation of a fire, which could travel along a belt. Further, persons would not be warned of the fire by either an auditory or visual alarm. I conclude that the violation was of a moderately high level of gravity. There has been no evidence adduced as to the length of time the violation existed prior to Delp's inspection. Nor has there been any evidence adduced to predicate a conclusion that Respondent knew or should reasonably have been expected to know that the violation had occurred. Accordingly, I conclude that Respondent herein operated with only a low degree of negligence. I find that the penalty herein of \$75 is appropriate.

On February 1, 1990, Delp issued Citation No. 3206325. According to Delp, Respondent violated the approved Ventilation Plan, ("the Plan") by: (1) removing two concrete stoppings that had been in the No. 5 intake entry, and replacing them with "loosely hanging" line brattice cloth (Tr. 141), and (2) installing a brattice cloth over an opening in an overcast.^{1/} The Plan, with regard to permanent stoppings, provides that they are "constructed of 4" x 8" x 16" concrete block and pilaster." (sic) (Government 5, Attachment B). The Plan further provides that "Temporary stoppings are constructed of mining timbers, 1" x 2" x 2" boards, and approved brattice material." (Government 5, Attachment C).

Respondent did not rebut or impeach Delp's testimony that brattice cloth, that did not have any boards, were installed at locations that previously contained permanent stoppings. Brattice material is clearly not permitted by the Plan to be used as a permanent stopping, as by its terms, only concrete blocks and "pilaster" (sic) are allowed. In essence, according to Couch, the line brattices were installed for use only as temporary stoppings. There is no evidence Respondent applied for approval to change its Plan and replace permanent stoppings with temporary ones. Further, according to the Plan, temporary stoppings are to be constructed of boards and approved brattice material.^{2/} In contrast, although the brattices herein were approved flame-resistant, they were hung without boards. Thus, I find that Respondent did violate its Ventilation Plan.

The Citation issued by Delp indicates the violation to be significant and substantial. No evidence was adduced specifically with regard to the likelihood of a hazard contributed to by the violation, resulting in an injury. (See, Mathies, supra). In general, Delp indicated that the hazards with regard to the violation herein are the same as was discussed by him in connection with Citation No. 3206457. In this previous testimony Delp set forth the hazards of belt and intake air mixing. However,

^{1/} For the reason set forth in the disposition of Citation No. 3206457, infra, I find that it has not been established that the installation of a line brattice to cover an opening in an overcast violates the Ventilation Plan.

^{2/} I interpret Government Exhibit 5, Attachment C, as indicating that the Plan requires brattices to be used in conjunction with boards.

these hazards were created because the brattice cloth did not provide a perfect seal where it replaced permanent stoppings. In contrast, the record is lacking sufficient evidence as to the hazards contributed to by the violation herein, i.e., the utilization, per se of a material that is not permitted by the Plan for use as a stopping. Accordingly, I conclude that it has not been established that the violation herein was significant and substantial.

According to Couch, the permanent stoppings were removed to allow equipment to be taken in and out the entry in question to rebuild supports necessitated by a bad roof condition. Further, he indicated that permanent stoppings, called for by the Plan, were not rebuilt, as an overcast was placed where the temporary stopping was located. Couch also indicated that curtains, of the same material as the brattices in issue, are used at the face to deflect air. I find that Respondent in utilizing the cloth in question, acted pursuant to a good faith belief that the material was allowed by the Plan. I conclude that Respondent was negligent to a low degree. I find that the gravity of the violation to be moderate. I find that a penalty of \$75 is appropriate for this violation.

Citation No. 3206326

Delp issued Citation No. 3206326 alleging a violation of 30 C.F.R. § 75.507-1(a) in that a power center was located in the No. 2 Entry approximately 60 feet outby Survey Spad No. 148. Delp in his testimony indicated that the power center was not permissible and was in a return entry ventilated by return air. Section 75.507-1(a) prohibits nonpermissible equipment in return air.

Essentially, according to Delp, return air from the 008 Section, where coal was being mined, coursed through Return Entry No. 2 where the power center was located. According to Delp, the air in Entry No. 2 is considered return air as it comes off the 008 Section where coal was being mined. Respondent did not rebut or otherwise impeach the credibility of this testimony. Further, Delp's definition of return air is consistent with that contained in A Dictionary of Mining, Mineral, and Related Terms (Department of Interior, 1968) ("DMMRT"), which defines "return air" as ". . . 2.b. Air which has circulated the workings and is flowing towards the main mine fan." Accordingly, I find that Respondent herein did violate Section 75.507-1(a), supra, as alleged.

According to Delp, there would be a "probable" ignition source if dust or gas is carried from the working section and gets into the the nonpermissible power center which has various electrical components operating at 12,470 volts (Tr. 183). He indicated that the cable supplying electricity to the power

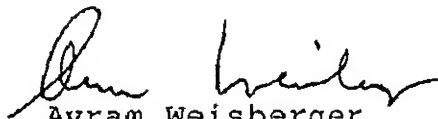
center does experience shorting, and he knows of situations where high voltage cables have blown up causing sparks and heat. However, no evidence was adduced with regard to the condition of the specific cable that was connected to the power center.

Delp stated that with an accumulation of methane and float dust from the face, there would be "more potential" for ignition and explosion (Tr. 184). He indicated that testing by him within 60 feet of the cited area, revealed methane at concentrations of .01 percent or 3180 cubic feet per 24 hour period in the No. 2 Entry, and 2400 cubic feet per 24 hour period in the No. 1 Entry. However, he indicated on cross-examination that "what counts" is the percentage of methane and the percentages present were not combustible (Tr. 194). I find this evidence fails to establish that the violation was significant and substantial.

According to Delp, the location of the power center was obvious. Respondent did not rebut or impeach this conclusion. I find the negligence herein be moderate. I conclude the gravity was moderate. I find that a penalty of \$100 is proper for the violation found herein.

ORDER

It is ORDERED that Citation No. 3206457 be DISMISSED. It is further ORDERED that Citation Nos. 3206452, 3206454, 3206323, 3206325, and 3206326 be AMENDED to reflect the fact that the violations therein are not significant and substantial. It is further ORDERED that Respondent pay \$650, within 30 days of this Decision, as a Civil Penalty for the violations found herein.



Avram Weisberger
Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

Neville Smith, Esq., Smith & Smith, 110 Lawyer Street, Manchester, KY 40962 (Certified Mail)

dcp

OCT 26 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 90-67
Petitioner	:	A. C. No. 36-05466-03721
v.	:	
	:	Emerald No. 1 Mine
CYPRUS EMERALD RESOURCES	:	
CORPORATION,	:	
Respondent	:	
	:	

DECISION

Appearances: Anita D. Eve, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary;
Michael R. Peelish, Esq., Cyprus Minerals Company, Englewood, Colorado, for the Respondent.

Before: Judge Weisberger

Statement of the Case

In this proceeding the Secretary (Petitioner) filed a petition for an assessment of civil penalty alleging a violation by the Operator (Respondent) of 30 C.F.R § 75.316. Subsequently, the Respondent filed a timely Answer, and pursuant to notice, the case was heard in Washington, Pennsylvania, on July 31, 1990. At the hearing, Walter Daniel and Robert Newhouse testified for Petitioner. Dennis Dobosh and Edmund Francis McIntire testified for Respondent. Respondent filed a Posthearing Brief on October 11, 1990. On October 18, 1990, Petitioner's Findings of Fact, Conclusions of Law, and Brief were received.

Stipulations

At the hearing, the Parties entered into the following stipulations:

1. Cyprus Emerald Resources Corporation is the owner and operator of the Emerald No. 1 Mine located in Greene County, Pennsylvania.
2. Cyprus Emerald Resources Corporation and its Emerald No. 1 Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge of the Federal Mine Safety and Health Review Commission has jurisdiction over this case pursuant to Section 105 of the Act.
4. A copy of Section 104 and Citation No. 3098272 was properly served by Walter Daniel, a duly authorized representative of the Secretary of Labor, U. S. Department of Labor, upon an agent of Respondent, Cyprus Emerald Resources Corporation, on July 26, 1989, at the time and place stated therein and may be admitted into evidence for the purpose of establishing its issuance, not necessarily for the truthfulness or relevancy of any statements asserted therein.
5. Cyprus Emerald Resources Corporation is a large operator and the subject mine is a large mine.
6. Cyprus Emerald Resources Corporation's operations affect interstate commerce.
7. In the 24 months preceding the issuance of Citation No. 3098272 there were 700 violations cited in the subject mine.
8. The assessment of a Civil Penalty in this proceeding will not affect the coal mine operator's ability to continue with business. (sic).
9. Emerald Mine No. 1 is a gassy mine in that it liberates more than 2,000,000 cubic feet of methane or other explosive gasses during the 24-hour period during mining operations and is under the five day spot inspection cycle mandated by Section 103(i) of the Mine Act, 30 U.S.C. Section 813, Section (i).

Findings of Fact and Discussion

I.

On July 26, 1989, at the 4 Gate Section of Respondent's Emerald Mine No. 1, intake air coursing in by Entry No. 2 ventilated the face, and then was returned from the face through a 16 inch diameter slider tube that had been placed inside a 20 inch diameter tube, and which extended from the 20 inch main tube in by towards the face. Walter Daniel, an MSHA Inspector, inspected this area on July 26, 1989, and issued a Section 104(a) Citation alleging a violation of 30 C.F.R. § 75.316. Essentially, he testified that the equipment used by the Respondent was in violation of its ventilation plan, which provides, under the page heading AUXILIARY FAN INFORMATION, inter alia, the following language under the paragraph heading Type and Diameter Tubing "Tubing is made of rigid plastic. They are 18" diameter tubes, with 16" diameter slider tubes." (Government

page 19). Essentially, it is Respondent's position that the language in the ventilation plan sets forth only minimum standards, and accordingly, it was not in violation of the plan by substituting a 20 inch diameter tube in lieu of a 18 inch tube.^{1/}

Dennis Dobosh, Respondent's safety supervisor, testified that although he was not responsible for drafting the language contained in the Ventilation Plan, ("the Plan"), he was nonetheless responsible for its content. He testified that the Plan sets forth language indicating that the tubing is of 18 inch in diameter with 16 inch diameter slider tubes, as these were the diameter of the tubes that were being used, and thus the use of the larger tubes was not precluded.

I find that the clear language of the ventilation plan, in setting forth the type and diameter of tubing, refers to 18 inch diameter tubes with 16 inch slider tubes. Thus, inasmuch as Respondent herein was using a 20 inch diameter tube, which was not in conformity with the ventilation plan, Respondent violated Section 75.316, supra, as alleged in the issued Citation.

1/ Essentially, it is also Respondent's position that it was in full compliance with the ventilation plan. The plan requires 6000 cubic feet a minute of air to ventilate the working face where a continuous mining machine is being operated, and only "perceptible movement" (Respondent Exhibit No. 2, page 2) in a working place where a continuous miner is not in operation. In this connection, Respondent's Mine Examiner's Report of Daily Inspections indicates that on July 26, 1989, at 5:00 a.m., the face was ventilated with 9630 cubic feet per minute. At the time the Citation was issued the continuous miner was being repaired in the fourth crosscut outby the face. There is no direct evidence of the actual air flow at the face. However, Daniel indicated that the readings he took at the 20 inch and 16 inch tubes reveled air movements of less than 6000 and less than 5000 cubic feet a minute respectively. Thus, it could easily be inferred that there was at least perceptible movement of air at the face at the time of the Citation, and accordingly Respondent was in compliance with the portion of its plan requiring minimum ventilation of air. This fact is taken into account in evaluating the gravity of the violation, and the degree of Respondent's negligence. (III., infra). However, it is not a successful defense, as it does not rebut the fact of the violation itself. In this connection, the violation is predicated upon the usage of a 20 inch diameter tube with a 16 inch diameter slider tube, whereas the Ventilation Plan unequivocally states that the type of tubes are 18 inches in diameter with 16 inch diameter sliders.

II.

According to Daniel the violation herein is to be characterized as significant and substantial. Robert W. Newhouse, a supervisory coal mine inspector, essentially concurred in this characterization. The subject mine has a history of ignitions, and is a gassy mine. Daniel indicated that on July 26, prior to the issuance of the citation in question, testing performed by him at a point approximately 20 feet outby the face, revealed methane in a concentration of .9 percent, which he termed "border-line" (Tr. 39). Both Daniel and Newhouse opined that there would be more methane found at the face as that is where it is generated. As explained by Daniel and Newhouse, some of the intake air coursing inby Entry No. 2 towards the face would be diverted from the face and would enter the 20 inch diameter tube, as a consequence of a significant gap in its opening created by the placement therein of a tube whose diameter was only 16 inches. The gap created is clearly double that which would have resulted had a 16 inch flexible tube been placed inside an 18 inch diameter tube as provided by the ventilation plan.^{2/} In this connection, an inspection report indicated that at 5:00 a.m., on July 26, Entry No. 2 face was found to have .7 percent methane, even though it was being ventilated with an air flow of 9630 cubic feet per minute. Dobosh in his cross-examination conceded that if this air flow would be decreased it could result in a methane problem. Thus, it is clear that the placement herein of a 16 inch diameter slider tube within a 20 inch tube contributed to the hazard of a methane build up, which could have led to a build up in an explosive range of between 5 and 15 percent.

^{2/} I do not place much weight on the testimony of Newhouse that placing a 16 inch diameter tube within a 20 inch diameter tube resulted in a 40 percent loss of air to the face. This conclusion is predicated upon the testimony of Daniel with regard to a comparison of the air flow through the 16 inch and 20 inch diameter tubes. However, the testimony of Daniel can not be relied on on this point as he did not testify to the exact specific air flow, but merely indicated that at the 20 inch tube it was less than 6000 and at the 16 inch tube less than 5000. Similarly, I do not place much weight on the testimony of Dobosh that the air lost in using a 20 inch tube to contain a 16 inch slider tube is only 16 percent, as this was based solely upon a calculation of the difference in the area of the opening to each tube, and did not take into account any difference in air resistance. Nor did it take into account the impact of the difference in distance between the opening of each tube and the ventilation fan. It is noted, in this connection, that the slider or innertube protruded from the outer tube inby towards the face, but the evidence is lacking as to this distance.

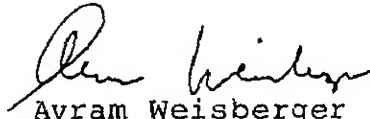
In order for the violation herein to be considered to be significant and substantial, Petitioner must establish that there was ". . . a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." (U.S. Steel Mining Incorporated 6 FMSHRC 1834 at 1836 (1984)). In this connection Daniel testified that, considering the gassy nature of the mine, and the reading of .9 percent found on the date of the citation, there "could have been" an ignition upon a resumption and continuation of mining (Tr. 41). Newhouse opined that inasmuch as air was not properly getting to the face, a methane ignition was "very likely" (Tr. 106). He also indicated that an ignition could "very easily" burn someone (Tr. 106). According to Daniel, two to four miners could have been injured. However, at the time of the violation, the continuous miner was being repaired, and Daniel indicated that there were no ignition sources in No. 2 Entry face. Further, the evidence has not convincingly established that, once mining would have resumed, it would have been reasonably likely, for the violative condition to have bled sufficient air flow, to the extent that the amount of air going to the face, would not have been sufficient to render harmless methane therein. In this connection, I note that the evidence is not adequate to predicate a specific finding as to the precise loss of volume of air to the face occasioned by the gap between the 20 inch outer tube and the 16 inch slider tube. I thus conclude that it has not been established that it was reasonably likely that any hazard of methane accumulation, contributed to by the violation, would have resulted in an injury producing event. I thus conclude that it has not been established that the violation herein was significant and substantial. (c.f., U.S. Steel Mining Corporation, supra).

III.

I accept the testimony of Dobish that, in essence, Respondent believed that having a 16 inch slider tube within a 20 inch tube was not a violation of its Ventilation Plan. There is no evidence that this belief was not in good faith. I thus conclude that there was only a low degree of negligence on the part of the Respondent with regard to the violation herein. Taking into account the facts that there were no ignition sources at the face at the time of the violative condition, and that the air flow at the face met the standard set forth in the ventilation plan, but that the violation could have led to a build up of methane at the face, I conclude that the violation herein was of a moderate level of gravity. I conclude that a penalty of \$150 is appropriate for the violation found herein.

ORDER

It is hereby ORDERED that the Respondent shall, within 30 days of this Decision, pay \$150 as a civil penalty for the violation found herein. It is further ORDERED that Citation No. 3098272 be AMENDED to reflect the fact that it is not significant and substantial.



Avram Weisberger
Administrative Law Judge

Distribution:

Anita D. Eve, Esq., Office of the Solicitor, U. S. Department of Labor, Room 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Michael R. Peelish, Esq., Cyprus Minerals Company, 9100 East Mineral Circle, Englewood, CO 80112 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 SKYLINE, 10th FLOOR

5203 LEESBURG PIKE

FALLS CHURCH, VIRGINIA 22041

OCT 29 1990

ALOE COAL COMPANY,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. PENN 90-242-R
	:	Citation No. 3092481; 8/24/90
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. PENN 90-243-R
ADMINISTRATION (MSHA)	:	Citation No. 3092482; 8/24/90
Respondent	:	
	:	Aloe Strips
and	:	
	:	Mine ID 36-00799
UNITED MINE WORKERS OF	:	
AMERICA,	:	
Intervenor	:	
	:	

DECISION

Appearances: David J. Laurent, Esq., Polito & Smock, P.C.,
Pittsburgh, Pennsylvania, for the Contestant;
Edward Fitch, Esq., Office of the Solicitor, U. S.
Department of Labor, Arlington, Virginia for the
Respondent;
Paul Girdany, Esq., Healey and Whitehill,
Pittsburgh, Pennsylvania for the Intervenor.

Before: Judge Weisberger

Statement of the Case

These cases are before me based on a Motion for an Expedited hearing filed on August 29, 1990, contesting the issuance of Citation No. 3092481 and Order No. 3092482. On August 29, 1990, pursuant to a telephone conference call on that date between the undersigned, Counsel for both Parties, and Counsel for the International Union, United Mine Workers of America (UMWA), the cases were set for hearing in Pittsburgh, Pennsylvania, on September 6, 1990. On September 4, 1990, the International Union, UMWA, filed a Notice of Intervention. On September 4, 1990, Intervenor initiated a conference call between the undersigned and Counsel for the other Parties, and requested an adjournment of the hearing scheduled for September 6, 1990, on the grounds that a possible witness would not be available on that date. Neither Counsel for Contestant nor Counsel for Respondent objected to this request and it was granted. These cases were rescheduled and were heard in Pittsburgh, Pennsylvania,

on September 28, 1990. At the hearing, Charles P. Swingle and Grant MacSwain testified for Contestant. Frederick A. Miller, Thomas Rabbitt, Greg Shuba, and Thomas Semak testified for Intervenor.

On September 26, 1990, Respondent filed a Prehearing Brief. At the hearing on September 28, 1990, Intervenor filed a Memorandum of Law in opposition to the Notice of Contest. At the hearing, Contestant requested and was granted 10 days to file a Posthearing Memorandum of Law, which was filed on October 9, 1990. At the hearing, Contestant did not object to the request by Respondent to be allowed 10 days to respond to Contestant's Posthearing Memorandum of Law, and accordingly, Intervenor and Respondent were granted the right to file a Reply within 20 days from the date of the hearing. On October 12, 1990, Intervenor filed a Memorandum of Law in response to Aloe Coal Company's Posthearing Brief. Respondent did not file any Reply.

Stipulations and Findings of Fact

The Parties have stipulated to the following relevant facts:

1. Aloe operates a bituminous coal strip mine in Allegheny and Washington Counties, Pennsylvania.^{1/}
2. On July 10, 1989, Aloe's employees, who were represented by the UMWA for purposes of collective bargaining, commenced a strike at the Aloe Mine.^{2/} Shortly thereafter, Aloe resumed mining operations with thirteen (13) replacement workers and six (6) Striking employees who had crossed the picket line and returned to work.^{3/}

^{1/} At the hearing, it was stipulated that Aloe Holding Company is owned by six members of the Aloe family, and the Aloe Holding Company owned 100 percent of the stock of Aloe Coal Company and Boich Mining Company, both of which are operating companies that mine bituminous coal. It was further stipulated that the six members of the Aloe family that own Aloe Holding Company individually own Robinson Coal Company which is engaged in the mining of coal. It also was stipulated that the Aloe family members and/or the Aloe Holding Company have other interests that are not pertinent to these proceedings.

^{2/} I find that as of the date of the hearing, these employees were still on strike, and that the last negotiating session was March 13, 1990.

^{3/} I find that Aloe presently has a full complement of active workers and is not planning to expand its work force.

3. Aloe converted the thirteen (13) replacement workers to permanent status and by letter dated March 23, 1990, the Regional Director for Region Six of the National Labor Relations Board ("Board") stated that Aloe had lawfully converted these individuals to permanent status and had lawfully notified the UMWA of this fact subsequent to December 8, 1989.

4. Both Aloe and the UMWA have been enjoined by the Courts of Common Pleas of both Washington and Allegheny Counties, Pennsylvania, from engaging in certain acts of picket line misconduct, including mass picketing at Aloe's operations in those Counties. Additionally, the Court of Common Pleas of Washington County, Pennsylvania has found the UMWA in contempt of its permanent injunction.^{4/} The Parties, however, agree that the aforesaid injunctions do not bar access to mine property by UMWA representatives to accompany a federal inspector on an inspection if it is determined in these proceedings that Section 103(f) of the Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. Section 813(f) provides the UMWA with such participation rights.

5. On July 5, 1988, while the UMWA members at Aloe were continuing to work without a contract and the UMWA and Aloe were engaged in negotiations, a settlement agreement was entered into with the National Labor Relations Board as a result of charges which the UMWA filed against Aloe alleging unfair labor practices at 5-CA-20892. This case was closed on October 6, 1989.^{5/}

6. On September 25, 1989, another settlement agreement was entered into with the National Labor Relations Board at 6-CA-21989 as the result of charges which the UMWA had filed against Aloe alleging unfair labor practices. Said September 25, 1989 settlement agreement provided that "the ongoing economic strike at the Aloe Mine was converted to an unfair labor practice strike effective July 30, 1989 and will continue to be

^{4/} It was stipulated that true and correct copies of the Injunction and Contempt Orders were attached to the Stipulations as Joint Exhibit 2-4. These documents were admitted in evidence as Joint Exhibits 5 and 6.

^{5/} It was further stipulated that a true and correct copy of the closing compliance letter and the Settlement Agreement (with change attached) was attached to the Parties' Stipulations as Exhibits 5 and 6. These documents were admitted in evidence as Joint Exhibits 5 and 6.

an unfair labor practice strike until the Employer complies with all the terms of the instant settlement agreement." This case was closed on December 11, 1989.6/

7. On March 22, 1989, a third settlement agreement was entered into with the National Labor Relations Board at 6-CA-22304 as the result of charges which the UMWA had filed against Aloe alleging unfair labor practices.7/

8. There are currently pending before the National Labor Relations Board six (6) charges filed by the UMWA against Aloe alleging unfair labor practices committed by Aloe. These Charges are numbered 6-CA-22871, 22898, 22960, 22971(1-2), and 23006.8/

9. On June 8, 1990, Aloe filed a certification petition with the Board seeking to have an election to ascertain the UMWA's continued status as the bargaining representative for its employees. The petition is still pending, but an election has not yet been scheduled.9/

10. By letter dated August 15, 1990, the Regional Director for Region Six of the Board dismissed charges filed by the UMWA which alleged that Aloe had, on June 6, 1990, unlawfully withdrawn recognition from the UMWA as the collective bargaining representative of Aloe's employers. This decision is presently being appealed by the UMWA

6/ It was further stipulated that true and correct copies of the Settlement Agreement (with change attached) and the closing compliance letter was attached to the Parties' Stipulations as Exhibits 7 and 8. These have been admitted in evidence as Joint Exhibits 7 and 8.

7/ It was further stipulated that a true and correct copy of the Settlement Agreement (with change attached) was attached to the Stipulations as Exhibit 9. This was admitted in evidence as Joint Exhibit 9.

8/ It was stipulated that a true and correct copies of these changes are attached to the Stipulations as Exhibit 10. This was admitted in evidence as Joint Exhibit 10.

9/ It was stipulated that a copy of the Petition was attached to the Stipulation as Exhibit 11. This was admitted in evidence as Joint Exhibit 11.

11. All but one of Aloe's twelve (12) UMWA strikers have applied for and are receiving unemployment compensation benefits under the Pennsylvania's Unemployment Compensation Act, 43 P.S. Section 751 et seq., on the basis that since they have been permanently replaced, the employer/employee relationship has been permanently severed.^{10/}

12. Prior to July 10, 1989, the UMWA and Local Union 9636's health and safety committee was, pursuant to 30 C.F.R. Section 40.3, the designated representative of the miners at the Aloe Mine.

13. On or about August 17, 1990, the UMWA advised the District Manager of the Mine Safety and Health Administration ("MSHA") District No. 2 that two of Aloe's UMWA strikers (Gary Metz and Frederick Al Miller) had designated Greg Suba,^{11/} a UMWA employee, as their "walkaround" representative within the meaning of Section 103(f) of the Act, and the regulations published at 30 C.F.R. Section 40.3. The UMWA also advised the District Manager that two other International UMWA officials, Tom Rabbitt and Larry Pasquale, would serve as alternate representatives in the event that Mr. Suba was unable to fulfill his duties.^{12/}

14. The UMWA members who designated Messrs. Suba, Rabbitt, and Pasquale as their representatives are among those who have been on strike at the Aloe mine since July 10, 1989.

15. By letter dated August 22, 1990, counsel for Aloe notified the District Manager for MSHA's District No. 2 that it would refuse to allow the UMWA representatives to accompany an MSHA Inspector during an inspection of the Aloe Mine.^{13/}

^{10/} It was stipulated that true and correct copies of these benefits were attached to the Stipulations as Exhibits 13-23. These were admitted in evidence as Joint Exhibit 13-23.

^{11/} The correct spelling is Shuba

^{12/} It was stipulated that a true and correct copy of the Authorization Form was attached to the Stipulations as Exhibit 24. This has been admitted in evidence as Joint Exhibit 24.

^{13/} It was stipulated that a true and correct copy of the letter was attached to the Stipulations as Exhibit 25. This was admitted in evidence as Joint Exhibit 25.

16. By letter dated August 23, 1990, Aloe notified the District Manager for MSHA's District No. 2 that all of Aloe's non-striking employees had selected Charles P. Swingle (an engineer for Aloe) as their representative in accordance with 30 C.F.R. Section 40.3.^{14/}

17. On Friday, August 24, 1990, Federal Mine Inspector John Mull arrived at the Aloe Mine for purposes of conducting an inspection pursuant to Section 103(g) of the Act, 30 U.S.C. Section 813(g). At the time, Inspector Mull indicated that Mr. Suba wished to accompany him as a "walkaround" pursuant to 30 C.F.R. Section 40.3.

18. Aloe refused to permit Mr. Suba or any other UMWA official or representative to enter the Mine and accompany Inspector Mull during the inspection.

19. Thereafter, Inspector Mull issued Citation No. 3092481. The Citation stated in pertinent part as follows:

During the course of a 103(g) inspection conducted on August 24, 1990, by the writer, Grant P. MacSwain, Vice President, refused to permit Greg Shuba (sic), a recognized representative of the miners in accordance with Part 40.3 Title 30 C.F.R., access to mine property to accompany this Inspector on a (sic) inspection.

Aloe Coal Company also indicated in a letter dated August 22, 1990, from its attorney, J. Michael Klutch, to Jennings D. Breedon, MSHA District Manager, stating, "Aloe will refuse access to its facilities to members, officers, and other representatives of the UMWA for the purpose of accompanying inspectors from the Federal Mine Safety and Health Administration as a 'walkaround' on health and safety inspections."

20. After a reasonable time to allow abatement of the Citation, Inspector Mull issued Order No. 3092482. The Order stated in pertinent part as follows:

^{14/} It was stipulated that a true and correct copy of the letter was attached to the Stipulations as Exhibit 26. This letter was admitted in evidence as Joint Exhibit 26. At the hearing, it was further stipulated that on August 23, 1990, representatives of MSHA were aware of the substance of Exhibit 26, and that the inspector saw a copy of that document prior to issuing the Citation on August 24.

No apparent effort was made by the operator to permit Greg Shuba (sic), a recognized representative of the miners, from traveling to mine property to accompany this inspector on this inspection. Grant MacSwain informed this inspector that Aloe would not permit Greg Shuba (sic) on mine property.

21. By letter dated Tuesday, August 28, 1990, Roger W. Uhazie, Acting District Manager for MSHA's District No. 2, advised Aloe's President, David Aloe, that unless Aloe filed a Notice of Contest with the Federal Mine Safety and Health Review Commission ("Commission") on or before August 31, 1990, and unless Aloe requested an expedited resolution of this matter, MSHA would implement Section 110(b) of the Act and propose a civil penalty of up to One Thousand Dollars (\$1,000.00) for each day that a failure to correct the cited violation continued. Mr. Uhazie also advised Mr. Aloe that if Aloe filed a Notice of Contest seeking an expedited resolution of this matter, MSHA would hold the Section 110(b) sanctions in abeyance pending a decision from the Commission on its Notice of Contest.^{15/}

Summary of the Facts

On July 10, 1989, the employees of Aloe Coal Company ("Aloe"), who were represented by the United Mine Workers of America (UMWA) for purposes of collective bargaining, commenced a strike at the Aloe Mine. As of the date of the hearing the strike had not settled, and there have not been any negotiations since March 1990. Aloe has continued operations with 13 replacement workers, who have been converted to permanent status, and 6 striking employees who returned to work.

On or about August 17, 1990, the UMWA advised the District Manager of the Mine Safety and Health Administration (MSHA), District No. 2, that two of the UMWA strikers had designated Greg Shuba, an UMWA employee, as their walkaround representative for purposes of Section 103(f) of the Federal Mine Safety and Health Act of 1977 (the Act).

^{15/} It was stipulated that a true and correct copy of Mr. Uhazie's letter was attached to the Stipulations as Exhibit 29. This letter was admitted in evidence as Joint Exhibit 29.

By letter dated August 23, 1990, Aloe notified the District Manager for MSHA District No. 2 that all of Aloe's nonstriking employees had selected Charles Swingle as their walkaround representative. On August 24, 1990, MSHA Inspector John Mull arrived at the Aloe Mine to conduct an inspection, pursuant to a request filed by UMWA. Mull indicated that Shuba wished to accompany him as a "walkaround." Aloe refused to allow Shuba to enter the mine as a walkaround. Mull issued a Citation, and thereafter a Section 104(b) Order alleging that Aloe improperly denied Shuba access to the mine to accompany him on an inspection, and that, accordingly, Aloe was in violation of Section 103(f) of the Act.

Discussion

As pertinent Section 103(f) of the Act provides ". . . a representative authorized by his miners" shall be given an opportunity to accompany a representative of the Secretary during an inspection of a mine. Thus, the clear language of Section 103(f), supra, indicates that only those representatives who are authorized by "miners," have a right to accompany an inspector. Section 3(g) of the Act defines "miner," as ". . . any individual working in a coal or other mine;." Thus the issue presented for resolution is whether the striking employees of Aloe who selected Shuba to represent them as a walkaround, are considered to be "miners" as defined in the Act.

Intervenor asserts that the Act is remedial in nature, and thus must be interpreted broadly. In essence, Intervenor and Respondent argue that the striking miners have an expectation of returning to work, and they and their representative have a vital interest in maintaining safety of the work place. For the reasons that follow, I reject these arguments.

In deciding this case, I conclude that the statutory definition of a "miner," as set forth in Section 3(g) of the Act, is controlling. There is an absence of binding legal authority that would permit an expansion of the statutory definition of a "miner" beyond its plain meaning.^{16/} In contrast, the 10th and D.C. Circuit Courts of Appeal have refused to extend the term "miner" beyond the clear wording of the statutory definition.

16/ In Clinchfield Coal Company, Docket No. VA 89-687-R, which is relied on by Respondent and Intervenor, Judge Broderick at a hearing, in a contest of a Closure Order, sustained a Motion by UMWA to intervene on behalf of striking employees. I am not bound by a ruling of a fellow Commission Judge. Further, Clinchfield is inapplicable to the instant case (n.17, infra).

In Emery Mining Corporation v. Secretary of Labor, 783 F.2d. 155 (10th Cir. 1986), the operator had refused to compensate its miner employees for training they received prior to their having been hired. In holding that the operator's policy did not violate the Act, the Court held that although the Act requires training for "new miners," none of the complainants therein were miners or employed by the operator at the time that they took their training. Thus, the Court refused to extend the plain meaning of the statutory definition of the term "miner," reasoning as follows: "When, as here, a statute is clear on its face, we can not expand the Act beyond its plain meaning." (Emery, supra, at 159). I find that this reasoning applies with equal force to the case at bar. Inasmuch as the Act on its face clearly limits the use of the term "miner" to those individuals "working" in a mine, it can not be expanded beyond its plain meaning to encompass individuals on strike as they are clearly not working in the mine. (See, also, National Industrial Sand Association v. Marshall, 601 F.2d 689 (3rd Cir. 1979), wherein the Court upheld regulations requiring, inter alia, the training of nonemployees working in a mine, and held, at 704, that, with regard to the definition of a "miner" as contained in the Act, "As its standard, the statute looks to whether one works in a mine, not whether one is an employee or nonemployee or whether one is involved in extraction or nonextraction operations.")

In Brock on behalf of Williams v. Peabody Coal Company, 822 F.2d 1134 (D.C. Cir., 1987), an operator of a mine, in rehiring laid-off employees, passed over some individuals at the top of the list because they had not received safety training. The Court indicated that the issue for resolution was whether the laid-off individuals who had been passed over, qualified as miners while they were laid-off. The Court rejected the argument of the Secretary that a miner is one who is contractually entitled to employment. The Court took cognizance of the definition of a "miner" as contained in the Act, and noted the "... obvious fact that, at the moment when the operators decided not to recall them, they were not 'working in a coal . . . mine,' but were instead on layoff." (Peabody, supra, at 1140). (See, Westmoreland Coal Company, 11 FMSHRC 960 (1989) wherein the Commission, in finding that individuals who obtained training at their own expense during a layoff were not entitled to reimbursement, held that individuals on a layoff status are not miners. See also, Emery, supra, wherein the Court, in reversing the Order of the Commission requiring an operator to compensate laid-off miners for prehire training that occurred while they were laid-off, found that it was uncontested that the laid-off individuals were not miners or employees and refused to extend the statutory definition of a miner to encompass individuals who were in a laid-off status).

I conclude that a plain reading of the statutory definition of "miner" excludes laid-off employees as well as those on strike as both are not working in a mine.^{17/} Indeed, following the case law established by Peabody, supra, Emery, supra, and Westmoreland, supra, it might be concluded that if an individual not working in a mine due to being laid-off solely by virtue of an act of the Operator, is not to be considered a "miner," then, a fortiori, an individual who takes action in removing himself from working in a mine by striking, is certainly not to be considered within the definition of a "miner."

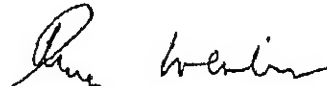
Inasmuch as the employees who appointed Shuba to represent them were on strike they were not miners within the Act. Accordingly Shuba was not a representative of miners and thus did not have any right to serve as a walkaround.^{18/} As such the Contest is sustained.

17/ I do not find Clinchfield Coal Company, supra, relied on by both Respondent and Intervenor to be applicable to the facts of the instant case. In Clinchfield, supra, the operator sought to challenge a Closure Order issued by an MSHA Inspector, and the UMWA sought to intervene on behalf of striking employees. The operator contended that the striking employees should not be considered "miners" under the Act. Judge Broderick in allowing UMWA to intervene reasoned that a decision on the contest of a Closure Order may affect the interests of miners who are on strike and are represented by the UMWA, and concluded that the striking miners were "miners" under Section 3(g) of the Act. However, as noted correctly by Contestant, Judge Broderick indicated that his conclusion was not "open-ended," and relied on evidence that the employees therein were only on strike for 4 months, and the employer and the Union were presently engaged in negotiations. In contrast, in the case at bar, the strikers have been permanently replaced, the strike has lasted for over 14 months, and the Parties are not negotiating.

18/ It is significant to note that the safety interests of those miners who were working at the mine on a day-to-day basis are being protected, inasmuch as all the nonstriking employees selected a walkaround to represent their interests during MSHA Inspections.

ORDER

It is ORDERED that the Notice of Contest is SUSTAINED, and it is further ORDERED that Citation No. 3092481 and Order No. 3092482 be DISMISSED.


Avram Weisberger
Administrative Law Judge

Distribution:

David J. Laurent, Esq., Polito & Smock, P.C., Four Gateway Center, Suite 400, Pittsburgh, PA 15222 (Certified Mail)

Edward Fitch, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Paul Girdany, Esq., Healey and Whitehill, Law and Finance Building, 5th Floor, Pittsburgh, PA 15219 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

October 29, 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 90-82
Petitioner	:	A. C. No. 01-00323-03633
	:	
v.	:	Chetopa Mine
	:	
DRUMMOND COMPANY	:	
INCORPORATED,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

The parties have filed a joint motion to approve settlement of the one violation involved in this case. The originally assessed penalty was \$1,000 and the proposed settlement is \$600. The parties have discussed the violation in light of the six statutory criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977.

Citation No. 3020731 was issued for a violation of 30 C.F.R. § 75.316 because a travelway was not maintained around a partial mining area due to roof falls near the survey station. The approved ventilation plan requires that travel be maintained until the area is sealed. The parties represent that the proposed reduction is justified because negligence and gravity were less than originally estimated. According to the parties, the operator was travelling and examining the return air course up to the back portion of the roof fall and the air course beyond the roof fall. However, the partial area of the air course where the roof fall was located, was not being traveled because the operator erroneously believed that it did not have to provide a travelway throughout the entire return air course. The operator thought that in order to comply with the plan, it only was required to examine behind the gob area. The parties advise that the operator is now aware of its responsibilities under the plan and that it immediately engaged in a good faith effort to correct the situation. They also aver that gravity is reduced because the number of miners affected by the violation was three or four instead of the eleven originally identified. I accept the foregoing representations and find that gravity and negligence were less than originally thought and approve the recommended settlement which remains a substantial amount.

Accordingly, it is ORDERED that the proposed settlement be APPROVED and the operator PAY \$600 within 30 days of the date of this decision.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and a long, sweeping underline.

Paul Merlin
Chief Administrative Law Judge

Distribution:

William Lawson, Esq., Office of the Solicitor, U. S. Department of Labor, Suite 201, 2015 Second Avenue North, Birmingham, AL 35203 (Certified Mail)

J. Fred McDuff, Esq., Drummond Company Inc., P. O. Box 10246, Birmingham, AL 35202 (Certified Mail)

Ms. Joyce Hanula, Legal Assistant, UMWA, 900 15th Street, N.W., Washington, DC 20005 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

October 29, 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 90-83
Petitioner	:	A. C. No. 01-02776-03510
	:	
v.	:	Bibby Mine
	:	
DRUMMOND COMPANY	:	
INCORPORATED,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT ORDER TO PAY

Before: Judge Merlin

The parties have filed a joint motion to approve settlement of the one violation involved in this case. The originally assessed penalty was \$800 and the proposed settlement is \$400. The parties have discussed the violation in light of the six statutory criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977.

Citation No. 3018301 was issued for a violation of 30 C.F.R. § 75.220 because roof bolt spacing in the entry and adjacent crosscuts ranged from 5-½ to 10 feet. However, the roof control plan required that installed roof bolts be no further than 5 feet apart. The parties represent that the reduction is justified because the negligence and gravity were not as high as originally estimated. According to the parties, this is a small mine which had been examined by the same inspector for approximately four months. During that entire period, this was the only instance where the inspector found the roof bolts to be in excess of 5 feet apart. In addition, the parties advise that the number of miners affected was three or four instead of the six originally noted. Finally, the parties aver that the two roof bolters responsible for the violation were given disciplinary warnings in accordance with the operator's progressive disciplinary program. I accept the foregoing representations and approve the recommended settlement which remains a substantial amount.

Accordingly, it is ORDERED that the proposed settlement be APPROVED and the operator PAY \$400 within 30 days of the date of this decision.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

Distribution:

William Lawson, Esq., Office of the Solicitor, U. S. Department of Labor, Suite 201, 2015 Second Avenue North, Birmingham, AL 35203 (Certified Mail)

J. Fred McDuff, Esq., Drummond Coal Inc., P. O. Box 10246, Birmingham, AL 35202 (Certified Mail)

Ms. Joyce Hanula, Legal Assistant, UMWA, 900 15th Street, N.W., Washington, DC 20005 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

October 29, 1990

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 90-314-D
ON BEHALF OF	:	
RANDY SHERBROOK,	:	Dry Fork Mine
Complainant	:	
	:	
v.	:	
	:	
T.I.C. WYOMING,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

ORDER TO PAY

ORDER OF DISMISSAL

Before: Judge Merlin

On October 15, 1990, the parties filed a joint motion to approve settlement in the above-captioned discrimination case. The motion sets forth the proposed agreement as follows:

The parties having conferred and agreed and the Secretary having been authorized by respondent to represent such agreement to the Commission, hereby move as follows:

1. Respondent was charged in the Complaint of Discrimination filed on or about August 4, 1990, with a violation of section 105(c) of the Mine Safety and Health Act, for terminating the employment of Randy Sherbrook.
2. Respondent has agreed, prior to the filing of the answer in this matter, to settle the existing dispute which is the subject of this action. Respondent will pay to Randy Sherbrook \$1,240.00 in full settlement of all matters in issue in this case.
3. Respondent has agreed to completely expunge from the personnel file of Randy Sherbrook, all comments and references to the circumstances involved in the May 24, 1990 incident at the Dry Fork Mine which led to the discharge of Mr. Sherbrook.
4. Accordingly, petitioner hereby agrees to withdraw her request for any further relief on behalf of Randy Sherbrook, withdraws her request for the assessment of

a civil penalty and reinstatement of Randy Sherbrook, and requests that this matter be dismissed. Such request is to be effective upon the approval of this settlement agreement by the Federal Mine Safety and Health Review Commission.

5. Petitioner and Respondent agree that Randy Sherbrook will sign a release of all claims arising out of this action, prior to submission of this Motion to the Commission, and in the event that he fails to sign such release, the settlement will not be effective, and the above amount will not be paid. Submission of this agreement to the Commission is a certification by Petitioner that such release has been signed.

6. Each party hereby agrees to bear its own fees and other expenses incurred by such party in connection with any stage of this proceeding.

WHEREFORE, the parties move the Commission to approve the above settlement agreement pursuant to 29 C.F.R. § 2700.30, Rules of Procedure, FMSHRC, and to order payment of \$1240.00 to Randy Sherbrook within ten days of the filing of an order approving settlement, and to dismiss the complaint filed in this action.

I find the settlement appropriate under the circumstances and note that the motion has been signed by all the parties including the complainant.

Accordingly, it is ORDERED that the proposed settlement be APPROVED and the operator PAY \$1,240 to Randy Sherbrook within 10 days of the date of this order.

It is further ORDERED that this case be DISMISSED.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and a long, sweeping underline.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Margaret A. Miller, Esq., Office of the Solicitor, U. S. Department of Labor, 1585 Federal Office Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Richard T. Casson, Esq., P. O. Box 774608, 401 Lincoln Ave., Steamboat Springs, CO 80477 (Certified Mail)

OFFICE OF ADMINISTRATIVE LAW JUDGES
 2 SKYLINE, 10th FLOOR
 5203 LEESBURG PIKE
 FALLS CHURCH, VIRGINIA 22041

OCT 31 1990

CHARLES T. SMITH,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. KENT 90-30-D
	:	MSHA Case No. BARB CD 89-27
KEM COAL COMPANY,	:	
Respondent	:	No. 25 Prep Plant

DECISION

Appearances: Michael S. Endicott, Esq., Ed Spencer's Law
 Offices, Paintsville, Kentucky, for the
 Complainant;
 Timothy Joe Walker, Esq., Reese, Lang & Breeding,
 P.S.C., London, Kentucky, for the Respondent.

Before: Judge Fauver

Complainant brought this action under § 105(c) of the
 Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801
et seq., alleging a discriminatory discharge.

Having considered the hearing evidence and the record as a
 whole, I find that a preponderance of the substantial, reliable,
 and probative evidence establishes the following Findings of Fact
 and further findings in the Discussion below:

FINDINGS OF FACT

1. Respondent operates a coal washing facility, known as
 No. 25 Preparation Plant, where it processes coal for sale or use
 in or substantially affecting interstate commerce.

2. Complainant was employed at the plant as a bulldozer
 operator from October, 1988, until July 17, 1989, when he was
 discharged.

3. His principal duty was to push piles of coal into
 feeders at the bottom of tall stacking tubes. Coal was carried
 by conveyor belts into the stackers, 20 to 25 feet high, each
 having windows at various levels. The coal would fall through
 the stacker to the lowest window and from there out onto a cone
 shape pile that would form on the ground. Feeders at the base of
 the stacker vibrated the material through a hopper and onto a
 conveyor belt leading to the washing plant.

6. Ordinarily, a cone of coal would form at the base of a stacker and above the feeder, so that the system would mechanically feed the coal through the hopper onto the conveyor belt to the washer. The bulldozer operator was there to push coal into the feeders as needed, e.g., when there was spillage or when the cone of coal on the ground had not accumulated enough for the system to feed itself.

7. At times the lower windows or the chutes inside the stacker would become clogged by wet coal or mud. Instead of falling from the lower windows and directly onto the coal pile, the coal would then fall from the higher windows, creating a potentially dangerous situation for the bulldozer operator. Because the bulldozer operated at irregular and steep angles, falling coal could strike its windows, headlights, and other equipment. Depending upon the angle of exposure of the bulldozer, the height and quantity of falling coal, the bulldozer operator could be severely injured by falling coal, e.g., if coal broke a window and either entered the cab or sent flying glass into the cab.

8. When a stacker became clogged, it was necessary to unclog the material. This was accomplished by shooting high pressure water into the stacker from the top, or if this did not work, by suspending a worker down into the stacker on ropes, to dig out the obstruction manually.

9. In mid-June, 1989, Complainant was operating a bulldozer, when the stacker became clogged. Coal was falling from the top windows striking the bulldozer, beating against its windows. Complainant was concerned for his safety, and used his CB to call the control room operator in the plant. He reached Tim Miller and told him about the safety problem and asked him to ask Complainant's foreman, Henry Halcomb, what he should do. Miller did so, and told Complainant that Halcomb said, "Go ahead and run it." Tr. 14. Then falling coal broke a window next to Complainant. He became more frightened and told Miller, "Tell him [Halcomb] that this dozer is getting the windows knocked out of it and we don't have enough coal to push." Miller spoke to Halcomb again, and told Complainant that Halcomb said, "Go ahead and run it." Complainant continued to run the bulldozer. Then its lights went out, because falling coal broke the lighting wires. He called Miller again, to tell him the wires were broken, and asked him what Halcomb wanted him to do. Miller told Complainant that Halcomb said if he did not want to run it, park it, go home, and he would have a mechanic fix it. This would have meant a loss of pay. Complainant pulled the bulldozer out of the coal, fixed the lights, drove back, and continued pushing coal. When asked at the hearing why he repaired the lights and resumed pushing coal, Complainant testified, "Henry [Halcomb] was in a hurry to push coal. He wanted me pushing coal." Tr. 14.

10. Later in June, 1989, Complainant complained to the foreman, Halcomb, face to face, stating that he was putting his life in danger by having him push coal when coal was striking the bulldozer. The foreman replied that Complainant's job was to push coal.

11. During the time that Halcomb was Complainant's foreman on the second shift, about 2 months, Halcomb harassed Complainant in many ways. He made him the butt of joking and teasing over a married woman who worked in a nearby grocery store, he ordered him to make coffee, which was not his job, he denied him a lunch break a number of times, and once when Complainant was accompanied in his truck by a boy who got fishing bait for him, Halcomb, mistaking the boy for a girl, asked Complainant who was the girl in his truck, implying he was seeing a girlfriend although he was married. Complainant complained to the mine superintendent about Halcomb's harassment.

12. On July 14, 1989, the incline belt broke, shutting down plant operations. The plant superintendent supervised the job of installing a new belt section. Everyone on the crew was allowed a lunch break except Complainant. The superintendent told Complainant that Halcomb would have someone relieve him for lunch, but when Complainant called Halcomb, about 1-1/2 hours before the end of the shift, for relief so he could have lunch,¹ Halcomb told him, "It's too close to quitting time now, you don't get to eat." Tr. 184-185.

13. The July 14 incident -- the latest of many -- took Complainant to a turning point in his relationship with his foreman. The next day, Saturday, June 15, Complainant arrived early and went to the superintendent's office, hoping to lay out his complaints about Halcomb's mistreatment of him, including endangering him in the operation of the bulldozer, harassing him, embarrassing him, and discriminatorily denying him lunch breaks. The superintendent was not there.

14. Complainant then went to the training room, where the employees usually gathered before beginning their workshift. This was shortly before 3:00 p.m., the starting time of Complainant's shift. Complainant met Halcomb there and told him that his harassing of him would have to stop, and that he was going to see the superintendent about Halcomb's mistreatment of him. He told him about being denied a lunch break the night before. Halcomb said the superintendent had supervised the crew that night, and any complaint about lunch should be made to the

¹ A bulldozer was needed whenever the stackers were in operation. Complainant could not take a lunch break unless Halcomb sent a bulldozer operator to relieve him.

superintendent, not Halcomb. After the crew members left the room, Complainant told Halcomb: ". . . [t]hat this putting me in a unsafe condition was going to stop, and he said it wasn't unsafe. That's when I told him that I was going to have . . . to let the Mine Safety and Health Administration find out what he was doing." Tr. 35. Halcomb told him not to threaten him. Complainant told Halcomb about the coal striking his dozer and that Halcomb had told him to keep pushing coal. Halcomb said that was "hearsay," and he had not said that. Complainant said, "What do you mean you didn't say that?" and added, "I told that control room operator what was going on and he told you, then he come back and told me what you said." Halcomb repeated, "That's hearsay." Complainant said, "That can't be hearsay, it's his job." Halcomb said, "No, it didn't happen that way," and Complainant called him a "lying son of bitch." Tr. 24. Complainant immediately apologized: ". . . [J]ust when the words left my mouth, I said, 'I apologize,' I said, 'I shouldn't have said that.' He said, 'It's already been said now . . .'" Tr. 24.

Halcomb then told Complainant, "You can go to the house" (Tr. 27), meaning that he was suspended without pay, and that he would have to see the superintendent the following Monday.

15. Halcomb then contacted the plant superintendent, Roger Cox, concerning the incident.

16. Roger Cox is an ordained minister who held two positions, i.e., mine superintendent and pastor of a local church.

17. Halcomb was aware of, or could reasonably expect, the superintendent/minister's sensitivity to profane language and his philosophy of supporting his supervisors. Halcomb shaped his factual account to Cox concerning the argument with Complainant, to injure Complainant in Cox's eyes. The account that Halcomb gave Cox was that (A) Complainant cursed him in front of the crew, and (B) Complainant called Halcomb a "God dam son of a bitching liar." Halcomb's account was inaccurate as to points (A) and (B) in that: he and Complainant were alone when Complainant swore at him and in that Complainant called Halcomb "a lying son of bitch," not "a God dam son of a bitching liar." Halcomb omitted the fact that Complainant had immediately apologized to Halcomb. Halcomb told Cox that, in the argument Complainant complained about losing a dinner break on Friday, and complained about danger in being required by Halcomb to run the bulldozer under falling coal. Halcomb did not tell Cox that Complainant had said he was going to complain to MSHA concerning his safety complaints about Halcomb.

18. On Monday morning, July 17, 1989, Complainant saw Cox, who "asked him what the problem was and why the incident took place" (Tr. 46). Cox testified that Complainant told him that Halcomb was endangering his life by forcing him to push coal

under falling coal, that he was harassing him, denying him lunch breaks, and that Complainant "couldn't take it anymore." Tr. 45-46. Cox asked Complainant whether he had sworn at Halcomb and Complainant said he had. Cox fired him at that meeting.

19. To Cox, cursing a foreman in front of his crew was a dischargeable offense. He testified that, if Halcomb and Complainant had been alone, "just between him and Henry, it could have probably been resolved," that is, without discharging Complainant. Tr. 65.

20. Cox did not question any of the crew members about the incident before he fired Complainant. He did not know that Complainant and Halcomb were alone when Complainant swore at him.

21. Cox had known Complaint for 8 or 9 years, had hired him in another plant where Cox worked, and hired him to work for Respondent. He regarded him as a good employee, and had no reason to discipline him before the incident on July 15, 1989.

DISCUSSION WITH FURTHER FINDINGS

Section 105(c) of the Act ² was enacted to ensure that miners will play an active role in the enforcement of the Act by protecting them against discrimination for exercising any of their rights under the Act. A key protection for this purpose is the prevention of retaliation against a miner who brings to an

² Section 105(c)(1) provides:

" No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act."

operator's attention or the attention of MSHA hazardous conditions in the workplace. ³

Generally, in order to establish a prima facie case of discrimination under § 105(c) of the Mine Act, a miner must prove that (1) he or she engaged in protected activity and (2) the adverse action complained of was motivated in any part by that activity. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that it was also motivated by the miner's unprotected activities and would have taken the adverse action on those grounds alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, supra. The ultimate burden of persuasion does not shift from the complainant. United Castle Coal Company, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and NLRB v. Transportation Management Corporation, 462 U.S. 393 (1983) (where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act).

Applying these principles, I find that Respondent violated § 105(c) of the Act by discriminatory adverse action, i.e., suspending Complainant without pay on July 15, 1989, and discharging him on July 17, 1989.

Complainant's safety complaints to his foreman, about being required to operate a bulldozer under falling coal, were protected activities. These included his safety complaints through the control room operator to his foreman in mid-June, 1989, his face-to-face complaint to his foreman after that, in June, 1989, and, on July 15, 1989, his reiteration of these complaints to his foreman and his statement that he would complain to MSHA about the foreman's endangering him by having him run the bulldozer under falling coal.

³ S. Rep. No. 95-181, 95th Cong., 1st Sess., at 35-36 (1977), U.S. Code Cong. & Admin. News 1977, pp. 3401, 3435-3436, reprinted as Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess. Legislative History of the Federal Mine Safety and Health Act of 1977 (1978).

The foreman's suspension of Complainant without pay on July 15, 1989, was adverse action by management and led to further adverse action. I find that the foreman was motivated in part to retaliate against Complainant because of his safety complaints and his statement that he intended to complain to MSHA about his safety complaints against the foreman. The foreman's discriminatory conduct against Complainant included:

- (1) suspending him without pay; and
- (2) giving a distorted factual account of the incident to the mine superintendent with the intention or expectation of influencing the superintendent to discharge Complainant.

Halcomb's distorted version to the superintendent was that Complainant had called Halcomb a "God damn son of a bitching liar" in front of his crew. Complainant did not use a religious epithet, or the language attributed by Halcomb, and he swore at Halcomb (calling him "a lying son of a bitch") when they were alone, and immediately apologized. Halcomb's account to the superintendent omitted the fact that Complainant immediately apologized to Halcomb and the fact that Complainant said he would report Halcomb's unsafe practices to MSHA.

Halcomb knew, or could reasonably expect, that the superintendent, who is a practicing pastor, would be offended by the religious epithet he substituted for Complainant's actual language, and that the superintendent would consider cursing a foreman in front of his crew a dischargeable offense.

The impact of the foreman's distorted account to the mine superintendent is clear from the superintendent's testimony:

- (1) The superintendent fired Complainant "for insubordination and for cussing Mr. Halcomb out" (Tr. 63).
- (2) The superintendent believed that Complainant "called Henry these names in front of Henry's people he had to manage, and . . . it placed him in a very bad position" (Tr. 63); "I think, you know, you can't get any lower as far as wording is concerned and the names he called him. It was just very degrading to Henry as a foreman, or as a man, and I don't think it left me any choice" (Tr. 44).
- (3) Had the superintendent known that Complainant swore at Mr. Halcomb when they were alone -- "just between him and Henry, it could have probably been

resolved," that is, without discharging Complainant (Tr. 65).

- (4) The superintendent did not know that Complainant had immediately apologized to Mr. Halcomb.

The fact that the superintendent was deceived by the foreman does not alter the fact that management, through its foreman, took discriminatory action against Complainant that resulted in his discharge.

I therefore hold that Respondent violated § 105(c)(1) of the Act by suspending and discharging Complainant.

CONCLUSIONS OF LAW

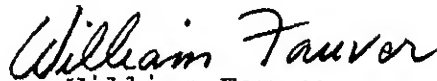
1. The judge has jurisdiction over this proceeding.
2. Respondent violated § 105(c)(1) of the Act by suspending Complainant without pay on July 15, 1989, and by discharging him on July 17, 1989.
3. Complainant is entitled to reinstatement with back pay, interest, and his litigation costs, including a reasonable attorney fee.

ORDER

WHEREFORE IT IS ORDERED that:

1. Respondent shall, within 30 days of this decision, reinstate Complainant in its employment, at the same position, pay, assignment, and with all other conditions and benefits of employment that he would have received had he not been suspended on July 15, 1989, and discharged on July 17, 1989, with no break in service concerning any employment benefit or purpose.
2. Within 15 days of this decision, counsel for the parties shall confer in an effort to stipulate the amount of Complainant's back pay, interest, and litigation costs, including a reasonable attorney fee. Such stipulation shall not prejudice Respondent's right to seek review of this decision. If the parties agree on the amount of monetary relief, counsel for Complainant shall file a stipulated proposed order for monetary relief within 30 days of this decision. If they do not agree on such matters, counsel for the Complainant shall file a proposed order of monetary relief within 30 days of this decision, and Respondent shall have 10 days to reply to it. If appropriate, a further hearing shall be held on issues of fact concerning monetary relief.

3. This decision shall not be a final disposition of this proceeding until a supplemental decision is entered on monetary relief.



William Fauver
Administrative Law Judge

Distribution:

Michael S. Endicott, Esq., Ed Spencer's Law Offices, P.O.
Box 1176, Paintsville, KY 41240 (Certified Mail)

Timothy Joe Walker, Esq., Reece, Lang and Breeding, P.S.C., P.O.
Drawer 5087, London, KY 40745-5087 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

October 31, 1990

DUININCK COMPANIES,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. LAKE 90-126-R
v.	:	Citation No. 3445314; 5/9/90
	:	
	:	KK003 Crushing Unit
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Mine ID 21-02845
ADMINISTRATION (MSHA),	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Merlin

This case is a notice of contest filed by the operator seeking to challenge the issuance of a citation by an inspector of the Mine Safety and Health Administration under section 104(a) of the Federal Mine Safety and Health Act of 1977.

The citation was issued on May 9, 1990. The contest was not received by the Commission until September 4, 1990. However, as set forth in the order dated September 24, 1990, previously entered herein, the contest was treated as filed on August 20, 1990, because that was the date of receipt indicated by the MSHA stamp on the letter from operator's counsel. In its most recent response the operator advises that its notice of contest was received by the Solicitor on August 10, 1990. The photocopy of the return receipt attached by the operator supports the date given in its motion. Accordingly, the date of filing now is accepted as August 10.

There still remains for determination the question whether the contest was timely filed. In his answer the Solicitor moves to dismiss on the ground that the contest was untimely. Unfortunately, the Solicitor cites neither applicable statutory provisions nor relevant case law. This experienced Solicitor knows better. However, timeliness clearly is in issue, and therefore, the order of September 24 required the operator to explain its position on the matter. In its response the operator alleges that because it had been given an extension to abate to August 15, it believed it had until then to file its notice of contest.

Section 105(d) of the Mine Act, 30 U.S.C. § 815(d), provides in relevant part:

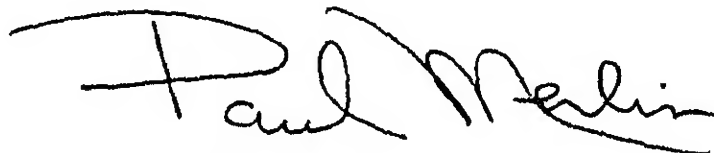
If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104 * * * the Secretary shall immediately advise the Commission of such notification and the Commission shall afford an opportunity for a hearing * * *

A long line of cases going back to the Interior Board of Mine Operation Appeals has held that cases contesting the issuance of a citation must be brought within the statutorily prescribed 30 days or be dismissed. Freeman Coal Mining Corporation, 1 MSHC 1001 (1970); Consolidation Coal Co., 1 MSHC 1029 (1972); Island Creek Coal Co. v. Mine Workers, 1 MSHC 1029 (1979); aff'd by the Commission, 1 FMSHRC 989 (August 1979); Amax Chemical Corp., 4 FMSHRC 1161 (June 1982); Rivco Dredging Corp., 10 FMSHRC 889 (July 1988); See Also, Peabody Coal Co., 11 FMSHRC, 2068 (October 1989); Big Horn Calcium Company, 12 FMSHRC 463 (March 1990); Energy Fuels Mining Company, 12 FMSHRC 1484 (July 1990). The time limitation for contesting issuance of citations must therefore, be viewed as jurisdictional.

The notice of contest in this case was filed three months after the citation was issued which was two months late. The Mine Act and applicable regulations afford no basis to excuse tardiness because the operator and its counsel mistakenly believe that the time for abatement extends the time to challenge the citation. Nor does relevant case law suggest support for any such approach. Accordingly, the operator's argument cannot be accepted.

The operator should be aware, however, that the issues it seeks to raise here may be litigated in the penalty suit when MSHA proposes a monetary assessment.

In light of the foregoing, it is ORDERED that this case be, and is hereby, DISMISSED.

A handwritten signature in dark ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and a long, sweeping underline.

Paul Merlin
Chief Administrative Law Judge

ADMINISTRATIVE LAW JUDGE ORDER

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

April 21, 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 89-20-M
Petitioner	:	A. C. No. 44-00071-05511
	:	
v.	:	Loudoun Quarries
	:	
CHANTILLY CRUSHED STONE,	:	
INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

This case is a petition for the assessment of civil penalties filed by the Secretary of Labor against Chantilly Crushed Stone, Inc., pursuant to the Federal Mine Safety and Health Act of 1977. The Solicitor has submitted a motion to approve settlement of the two violations involved in this case. The penalties were originally assessed at \$20,000 and the proposed settlement is for \$20,000.

The two subject citations were issued for violations of the Act after an investigation of a double fatality. The fatalities occurred when two miners who were trying to free a blockage of materials in a crusher-run bin became engulfed by the materials and were suffocated.

Citation No. 2852778 dated July 7, 1988, and modified on July 28, 1988, was issued for a violation of 30 C.F.R. § 56.16002(c) recites as follows:

"A double fatal accident occurred on 7-5-88 at 10:55 AM when the primary crusher operator and a Euclid haul truck driver was engulfed in crushed material in a bin. These two employees and a third employee was [sic] working to dislodge bridged material inside the bin without using safety belts and lines and the lines attended by another person. Safety belts and lines were provided by the company."

30 C.F.R. § 56.16002(c) provides:

(c) Where persons are required to enter any facility listed in this standard for maintenance or inspection purposes, ladders, platforms, or staging shall be provided. No person shall enter the facility until the supply and discharge of materials have ceased and the supply and discharge equipment is locked out. Persons entering the facility shall wear a safety belt or harness equipped with a lifeline suitably fastened. A second person, similarly equipped, shall be stationed near where the lifeline is fastened and shall constantly adjust it or keep it tight as needed, with minimum slack.

Citation No. 2852779 dated July 7, 1988, and modified on July 28, 1988, was issued for a violation of 30 C.F.R. § 56.16002(a)(1) recites as follows:

"A double fatal accident occurred on 7-5-88 at 10:55 AM when the primary crusher operator and a Euclid haul truck driver was engulfed in crushed material in a bin. A safe access was not provided to this bin where the hang ups that occurs frequently in this bin could safely be dislogged [sic]."

30 C.F.R. § 56.16002(a)(1) provides:

(a) Bins, hoppers, silos, tanks, and surge piles, where loose unconsolidated materials are stored, handled or transferred shall be --

(1) Equipped with mechanical devices or other effective means of handling materials so that during normal operations persons are not required to enter or work where they are exposed to entrapment by the caving or sliding of materials; and

* * * * *

The MSHA Accident Investigation Report describes the accident in pertinent part as follows:

Duane Brady, primary crusher operator, and Lester Cross, Euclid operator, reported for work on July 5, 1988, at 6:00 am, their regular starting time. The daily routine proceeded without incident until approximately 10:30 am, when Duane Brady * * * discovered a blockage in the crusher-run bin

where the material had completely filled the bin to its capacity of approximately 50 tons.

A blockage in this bin was not unusual, especially when the material being processed contained an abundant amount of clay as was the case the morning of the accident. This bin was known to plug as many as two or three times a day. * * *

* * * The three men [including Michael Smith, another Euclid driver, who had joined Brady and Cross] evaluated the situation and agreed to shovel off the top of the mounded material so they would have room to work inside the bin on the blockage. They assumed the blockage was close to the discharge port of the bin and never suspected a bridged-over void in the material. As the three men stood on the material, Mr. Brady suggested they get their safety belts and lines before starting. One of the other two men suggested they dig awhile before descending to the storage shed to get the belts and lines. About this time, Kenneth McSheffery, Euclid operator, arrived on the scene to assist the other three in clearing the blockage. The four men commenced to work as two teams--one team shoveled while the other team rested. After successfully leveling off the top, they dug a hole approximately 2 feet deep and 2 feet in diameter in what they determined to be the center of the bin. On completion of the hole, Duane Brady and Lester Cross began pushing a 3/4-inch diameter by 10-foot long section of pipe down through the material toward the blockage. They had difficulty forcing the pipe through the material so they struck it with a shovel thus, loosening the material near the bin draw point.

At this time, Bill Breitschwerdt, foreman, arrived at the scene. He had been in the office working on time cards and did not know the extent of the blockage. He traveled up the walkway and stood beside the shaker directly above the bin. He could not see inside the bin from this location, but he talked to the men. * * *

* * * Messrs. Brady and Cross began moving the pipe in a circular motion. Mr.

Smith stated he and Mr. McSheffery were resting on the side. Mr. Smith was standing in the corner and Mr. McSheffery was sitting on an I-beam. Mr. Breitschwerdt remained on the platform at the bottom of the bin to see if the blockage was caused by something protruding through the opening.

The blockage suddenly broke free and engulfed the two men as they were pulled down into the bin by the flowing material. * * *

* * * Messrs. Brady and Cross (victims) were completely covered by approximately 35 tons of material which remained in the bin.

* * * * *

This bin was not provided with any type of vibrator or mechanical device to eliminate these plug-ups. Safety belts and lines were provided and located in a nearby storage shed. The crusher operator who controlled the operation of the plant had a safety belt and line in his control room. The employees stated the crusher operator always utilized his belt and line anytime he went into the bin or worked around the crusher.

The established company policy stated that employees working in a bin or hopper or in danger of falling shall wear a safety belt with a line and be tied off. This property was exempt from MSHA enforcement of Part 48 training requirements; however, each of the victims received more than the required 24 hours of "New Miner" training in 1987. Mr. Brady received 27 hours of training, and Mr. Cross received 26-½ hours of "New Miner" training.

The Accident Investigation Report offered the following conclusions:

The accident occurred as a result of the employees entering the bin, without wearing safety belts and lines and being tied off, in an attempt to dislodge plugged-up material.

A combination of errors made by mine management and employees resulted in the death of two employees and the entrapment of

a third employee. Three of the four employees involved had performed the task of unclogging this particular bin many times in the past. Statements revealed normal procedure called for employees to get their safety belts and lines before entering the bin. However, the bin was filled above normal capacity and instead of climbing down into the bin, the employees climbed up on the piled material to shovel off the excess material so it was level with the top of the bin. The employees discussed how to go about unplugging it and decided to shovel the excess material level with the top of the bin before getting the necessary safety equipment. All involved failed to recognize the possibility of the existing void in the lower portion of the bin. The mine foreman had verbal contact with the employees, but failed to ask if they were tied off with safety belts and lines as was their normal procedure.

Management was aware of the problems with plug-ups in this bin requiring employees to enter it on a regular basis to dislodge the material. Management did not equip this bin with any type of mechanical device or engineering controls to eliminate the need for employees to enter this bin to clear plug-ups as a new facility was under construction.

In light of the foregoing, I conclude that the violations resulting from the failure to wear safety belts and from inadequate bin design represent the ultimate in gravity since there was a double fatality.

With respect to negligence in the safety belt violation, the Solicitor in his settlement motion advises that the decedents' failure to wear safety belts resulted in their fatalities. According to the Solicitor, the operator and its agents were responsible for the enforcement of this and all other MSHA standards. Hourly employees who were interviewed during the investigation, knew that the operator insisted on safety belts with tie off lanyards being used when they went into the bin. The decedent crusher operator knew that safety belts and lanyards were required and spoke to that effect while in the bin. The decedent Euclid driver also apparently knew of the rule. However, the miners made a conscious decision not to wear safety belts and lanyards. The Solicitor further states that the foreman had no actual knowledge that safety belts and lanyards were not being used. He was in the mine office when the miners

entered the bin area and when he subsequently arrived on the scene, he climbed the nearest walkway to the double deck screens above the bin to inquire on their progress. It was not possible to observe the activities in the bin from that location. It is also clear that the operator's employees had a very good working relationship i.e., helping each other out to get the job done. In the Solicitor's view, the positive attitude between the employees and the foreman may have provided the foreman with a false sense that there was no need to ask the miners if they were using safety belts believing that, of course, they would be.

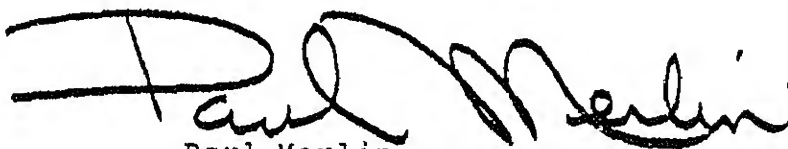
I accept the Solicitor's representation that the decedent miners were negligent in not wearing safety belts before they began to dig out the bin. It is clear from the record that the operator had trained these individuals and had a policy known to them which required the wearing of safety belts under these circumstances. Therefore, I do not believe the negligence of the decedents who were rank and file miners can be imputed to the operator. Southern Ohio Coal Company, 4 FMSHRC 1459 (1982). However, the record also indicates that the foreman was negligent. The Solicitor may well be correct in stating that the mutual respect between the miners and the foreman gave the foreman a false sense of security so that he did not ask the miners if they were using safety belts. But this does not exculpate either the foreman or the operator. Confronted with a situation where the men under his supervision were working in a very dangerous situation, the foreman should have made sure that safety belts were being used and he was negligent for not doing so. Also the foreman should have located himself in a place where he could have seen what was going on. Indeed, it does not appear that the foreman had input into the decisions about how to proceed to alleviate the blockage. It was left to the miners. In short, the foreman did not adequately supervise. Under such circumstances the foreman's negligence which left his workmen exposed to the existence of harm which was foreseeable, is attributable to the operator who placed the foreman in his position of responsibility. Wilmot Mining Company, 9 FMSHRC 684 (1987) affirmed in part, reversed in part, Case No. 87-3480 (6 Cir. 5/17/88 unpublished); Naaco Mining Company, 3 FMSHRC 848 (1981).

With respect to the bin, the Solicitor states that the operator's failure to act upon its knowledge that the bin was plugging frequently, also was a cause of the accident. According to the Solicitor, if the operator's engineering efforts had been focused upon an improved bin design, rather than upon construction of a new plant, the events which culminated in the fatalities might not have occurred. I find persuasive the Solicitor's representations and analysis with respect to the bin. Plugging was not novel or unexpected. On the contrary, it was a recurring problem known to the operator who should have attended to it by creation and installation of a device which would have eliminated such plug-ups. The operator must, therefore, be found negligent with respect to this violation.

Finally, the Solicitor advises that the operator is medium sized with a small history of prior violations and that the payment of the recommended penalties will not adversely affect its ability to remain in business.

Upon review of this matter I have determined that the recommended settlements are appropriate under the criteria of section 110(i) of the Act. In particular, imposition of the statutory maximum for each violation is warranted in view of the extreme gravity and the existence of fault. In this connection, it is also noted that the \$10,000 penalty maximum has not been changed in the twenty years since adoption of the Federal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742, 30 U. S. C. § 801 et seq.

In light of the foregoing, the recommended settlements are APPROVED and the operator is ORDERED TO PAY \$20,000 within 30 days from the date of this decision.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

Distribution:

Edward H. Fitch, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Ms. Rita G. Regino, Division of Chantilly Crushed Stone, Inc., Box 5, Chantilly, VA 22021 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 SKYLINE, 10th FLOOR

5203 LEESBURG PIKE

FALLS CHURCH, VIRGINIA 22041

SEP 28 1990

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 90-86-DM
ON BEHALF OF	:	MSHA Case No. MD 90-03
ALONZO WALKER,	:	
Complainant	:	Selma Mine
v.	:	
	:	
DRAVO BASIC MATERIALS COMPANY,	:	
INC.,	:	
	:	
AND	:	
	:	
R & S MATERIALS, INC.,	:	
Respondents	:	

ORDER

Before: Judge Fauver

On August 10, 1990, I issued a decision finding that Alonzo Walker was discharged by R & S Materials, Inc., on January 10, 1990, in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The parties were given additional time to submit proposed findings and conclusions on the issues of liability of Dravo Basic Materials Company, Inc., as a successor in interest, the civil penalty to be assessed, and the relief to be granted to Mr. Walker.

The parties have filed a proposed settlement of these remaining issues. I find the settlement to be consistent with the record and the purposes of the Act.

WHEREFORE IT IS ORDERED that:

1. The joint motion to approve settlement is GRANTED.

2. Within 30 days of this order, Alonzo Walker will be paid backpay from January 10, 1990, through April 22, 1990, in the amount of \$5,890.63, plus \$75.00 in interest. Such payment will be a full and complete accord and satisfaction of all monetary claims by Mr. Walker against Dravo and R & S arising out of his discharge on January 10, 1990. Dravo and R & S may allocate between themselves the responsibility for paying such backpay and interest.

3. Alonzo Walker will be reinstated by Dravo to the position of dragline operator at the Selma Mine at the same rate of pay as he earned on January 10, 1990, i.e., \$6.50 an hour. Reinstatement will occur at a date to be agreed upon by Dravo and Mr. Walker, but no later than October 29, 1990. Until such reinstatement, economic reinstatement of Mr. Walker as provided by the previous order of temporary reinstatement will continue.

4. Dravo acknowledges that it will consider, and is ordered to consider, the discharge of Mr. Walker on January 10, 1990, as null and void and of no effect. The record of such discharge will not be considered in any way in any future employment decisions, including but not limited to promotions, pay increases, and layoff, nor in any disciplinary proceedings concerning Mr. Walker.

5. Within 30 days of this order, Dravo and R & S shall pay a civil penalty of \$200 for the violative discharge of Mr. Walker. Dravo and R & S may allocate between themselves the responsibility for paying such civil penalty.

6. Upon compliance with this order, the Secretary shall file a satisfaction of order, signed by counsel for the Secretary and by Alonzo Walker.

7. The decision of August 10, 1990, and this order shall not become a final disposition of this proceeding until a supplemental decision is issued.


William Fauver
Administrative Law Judge

Distribution:

William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, 2015 Second Avenue North, Suite 201, Birmingham, AL 35203 (Certified Mail)

R. Henry Moore, Esq., Buchanan Ingersoll, P.C., USX Tower, 57th Floor, 600 Grant Street, Pittsburgh, PA 15219 (Certified Mail)

Harold A. Bowron, Jr., Esq., Balch and Bingham, 1710 North Sixth Avenue, P.O. Box 306, Birmingham, AL 35201 (Certified Mail)

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